STIPULATED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 666.

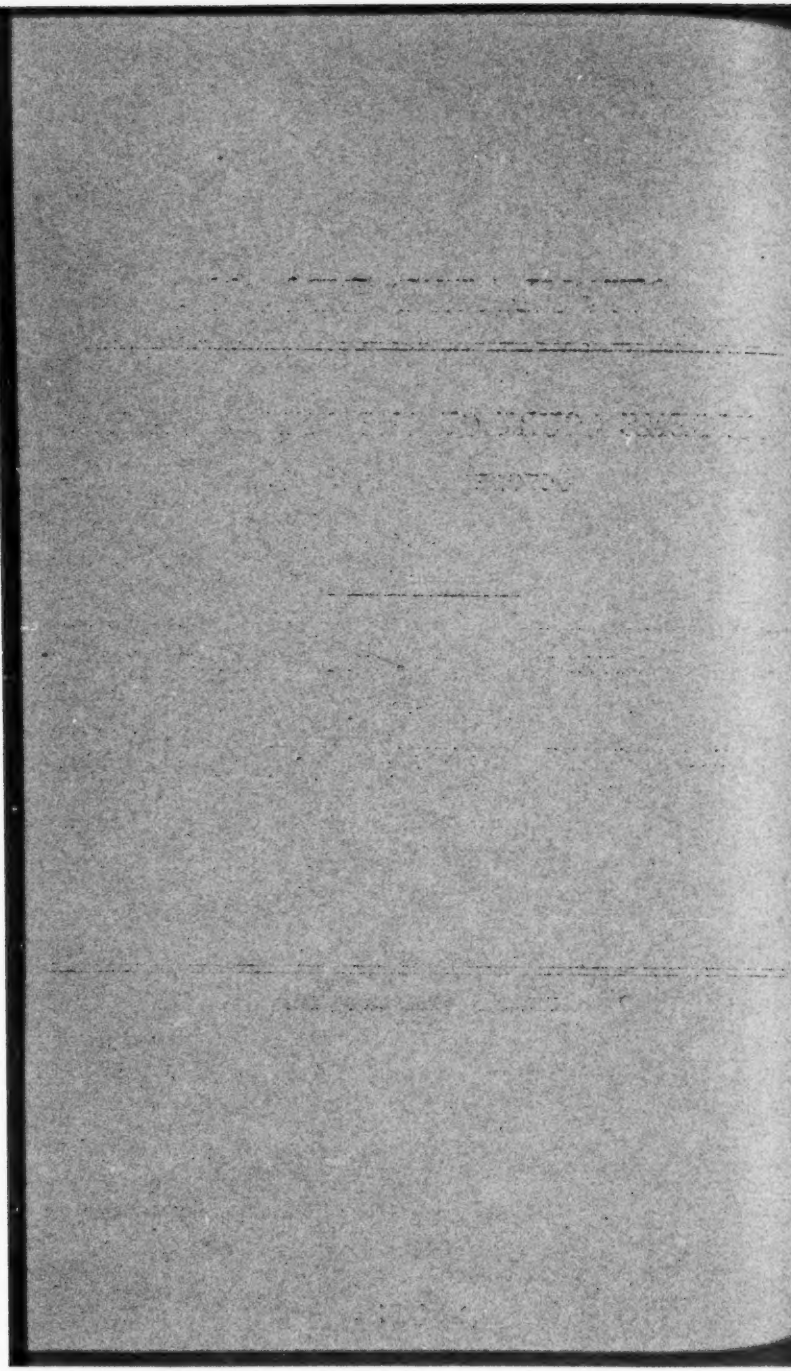
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED NOVEMBER 26, 1923.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 666.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

INDEX.

	Original.	Print.
Stipulation as to parts of record to be printed	1	1
Record from U. S. District Court, Northern District of—		
Georgia	3–190	2
Petition for appeal	3–190	2
Assignment of error	191	3
Order allowing appeal	193	4
Notice of appeal	194	4
Praecipe for transcript of record	195	5
Amendment and supplement to praecipe	197–209	6
Citation and service [omitted in printing]	211	7
Clerk's certificate	212	7

1 In the Supreme Court of the United States.
October Term, 1923.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellants,
vs.
AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, appellees. } No. 666.

SOUTHEASTERN EXPRESS COMPANY, APPELLANT,
vs.
AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, appellees. } No. 667.

SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and Southern Fisheries Association, appellants,
vs.
AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, appellees. } No. 668.

Stipulation for printing.

Inasmuch as the transcripts (with the exception of the appeal papers) in the foregoing appeals are triplicates, and in order to avoid unnecessary printing, by their respective counsel the parties stipulate:

1. In No. 667 the transcript shall be printed in full and shall stand as the printed transcript for the hearing of that appeal.

2. In No. 666 and No. 668 all parts of the transcripts preceding the petitions for appeal shall be omitted from the printing; in each the printing shall commence with and include the petition for appeal and shall embrace all documents following, except in Nos. 666 and 668 the statement of the evidence shall not be reprinted.

2 3. The printed transcript in No. 667 (minus the appeal papers in that case and the printed appeal papers in No. 666 and No. 668 shall constitute and stand as the printed transcripts for the hearing of the appeals in No. 666 and No. 668.

4. This stipulation is entered into without prejudice to the contentions of the American Railway Express Company that only one

appeal should have been taken in this matter, and all the appellants should have been properly made parties thereto.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General, for the United States, No. 666.
P. J. FARRELL,
Solicitor for the Interstate Commerce Commission, No. 666.
SANDERS McDANIEL,
CHARLES J. RIXEY,
Solicitors for Appellant, No. 667.
CHALLEN B. ELLIS and
CHAS. E. COTTERILL,
Solicitors for Appellants, No. 668.
H. P. MARX,
T. M. CUNNINGHAM, JR.,
ROBERT C. ALSTON,
Solicitors for American Railway Express Co.
HOLLINS N. RANDOLPH,
ROBERT S. PARKER,
Solicitors for all Appellees.

190 In the District Court of the United States for the Northern District of Georgia.

AMERICAN RAILWAY EXPRESS COMPANY, Complainant, *v.* THE UNITED STATES OF AMERICA, Defendant, and Interstate Commerce Commission, intervening defendant.	In Equity, No. 245.

Petition for appeal by United States of America and Interstate Commerce Commission.

Filed Oct. 26, 1923.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved by the order or decree of the District Court, made and entered October 11, 1923, granting the interlocutory injunction, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the order or decree erroneous as set forth in the assignment of errors on file to which reference is made.

Defendants pray that a transcript of the record, proceedings, and papers on which the order or decree was made and entered,

duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

C. P. GOREE,
Assistant United States Attorney, Northern District of Georgia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for the Interstate Commerce Commission.

[File indorsement omitted.]

191 In United States District Court.

Assignment of errors by and on behalf of the United States and Interstate Commerce Commission.

Filed Oct. 26, 1923.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the order or decree of the District Court of October 11, 1923, granting the interlocutory injunction.

The District Court erred:

I. In granting the application for interlocutory injunction.

II. In entering the following order, viz: That the execution and enforcement of the order of the Interstate Comcerce Commission set forth in the petition be, and the same is hereby, enjoined pending the further hearing of this case, and until the further order of the court.

III. In holding and adjudging that, under the acts to regulate commerce and the various and sundry acts amendatory thereof and supplementary thereto, the Interstate Commerce Commission was without power or authority to enter the order.

IV. In holding and adjudging that the American Railway Express Company is a "carrier by railroad," within the meaning of paragraph (4) of section 15 of the interstate commerce act.

V. In substituting its judgment for the judgment of the Interstate Commerce Commission on a subject matter committed to the exclusive jurisdiction of the commission.

192 VI. In not denying the application for interlocutory injunction.

Wherefore, defendants, and each of them, pray that the order or decree of the District Court may be reversed, annulled, and set

aside, with directions that the interlocutory injunction shall be dissolved and the bill of complaint dismissed, and for such other and further order as may be appropriate.

C. P. GOREE,
Assistant United States Attorney,
Northern District of Georgia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for the Interstate
Commerce Commission.

[File endorsement omitted.]

193 In United States District Court.

Order allowing appeal of United States of America and Interstate Commerce Commission.

Filed Nov. 3, 1923.

In the above-entitled cause, United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the order or decree of the District Court granting the interlocutory injunction, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and citation made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

This October 31st, 1923.

N. P. BRYAN,
United States Circuit Judge.
SAM'L H. SIBLEY,
ROBERT T. ERVIN,
United States District Judges.

[File endorsement omitted.]

194 In United States District Court.

Notice of appeal to Attorney General of Georgia.

Filed Nov. 3, 1923.

To the Honorable George M. Napier, Attorney General of the State of Georgia:

You are hereby notified that the defendant and intervening de-

of the District Court granting the interlocutory injunction to the Supreme Court of the United States and that the order allowing the appeal makes the citation returnable within thirty (30) days from the date thereof.

This notice is given you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

C. P. GOREE,
Assistant United States Attorney,
Northern District of Georgia.

I hereby acknowledge receipt of a copy of the above notice this 2d day of November, A. D. 1923.

GEORGE M. NAPIER,
Attorney General of the State of Georgia.

[File endorsement omitted.]

195 In the District Court of the United States for the Northern District of Georgia.

[Title omitted.]

Præcipe for record.

Filed Nov. 5, 1923.

To the clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of an appeal of the United States of America and Interstate Commerce Commission and include therein, in the order given below, the following, viz:

1. Bill of complaint.
2. Intervening petition of Seaboard Air Line Railway and order allowing the same.
3. Application for interlocutory injunction and affidavits in support thereof.
4. Intervention, appearance of counsel, and answer of Interstate Commerce Commission.
5. Motion of United States to adopt answer of the commission and order thereon.
6. Intervention of Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association, and order allowing same.
7. Intervention of Southeastern Express Company, order allowing same, and its answer.
8. Temporary restraining order, September 19, 1923.
9. Order granting interlocutory injunction, October 11, 1923.
10. Opinion of the court and dissenting opinion, October 11, 1923.
11. Petition for appeal.

196 12. Assignment of errors.

13. Order allowing appeal.

14. Citation.

15. Notice to Attorney General of Georgia.
16. Præcipe for record.
17. Stipulation as to record in the Supreme Court of the United States on appeals thereto.

C. P. GOREE,
Assistant United States District Attorney,
Northern District of Georgia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

Due and legal service of the within and foregoing præcipe acknowledged. Copy of same received, and all further service waived. This 5 day of November, 1923.

H. S. MARX,
T. M. CUNNINGHAM, Jr.,
ROBT. C. ALSTON,
Attorneys for Appellee,
American Railway Express Company.
HOLLINS N. RANDOLPH,
ROBT. S. PARKER,
Attorneys for Appellee,
Seaboard Airline Railway Company.

[File endorsement omitted.]

197 In United States District Court.

Amendment and Supplement to Præcipe.

Filed Nov. 9, 1923.

To the clerk:

Come now the United States of America and Interstate Commerce commission, joint appellants, and direct the amendment of the præcipe for record filed by them in the above-styled cause on November 5th, 1923, in connection with their appeal to the Supreme Court of the United States from the order or decree of October 11th, 1923, granting an interlocutory injunction, such amendment and supplement to be as follows:

1.

By striking paragraph 3, as the same appears in the original præcipe, and adding in lieu thereof —

"3.

"Application for interlocutory injunction and statement of evidence given at the hearing of such application, which statement of the evidence is to be included in the record on appeal, and which has been lodged in your office at the time of the filing of this amended præcipe under equity rule 75–B, together with stipulation of coun-

sel, acknowledgement of service and order of court approving such statement of the evidence."

2.

By striking from such original præcipe paragraph 17 reading as follows:

"17.

"Stipulation as to record in the Supreme Court of the United States on appeals thereto."

3.

By adding to the præcipe another specification as follows:

210 "Amendment and supplement to præcipe for record."

Pursuant to the foregoing, you are requested to omit from the transcript of record on this appeal the portions of the record to which the stricken specifications relate, and to add to such transcript the record specified herein under "3" and "16–A."

C. P. Goree,
Assistant United States Attorney,
Northern District of Georgia.

Blackburn Esterline,
Assistant to Solicitor General.

P. J. Farrell,
Solicitor for Interstate Commerce Commission.

Service of the within and foregoing amended and supplemental præcipe acknowledged. Copy of the same received.

Alston, Alston, Foster & Moise,
Lawton & Cunningham,
Attys. for Am. Ry. Ex. Co.

H. S. Marx,
Attorney for Appellee, American Railway Express Company.

This the 9th day of November, 1923.

H. N. Randolph,
R. S. Parker,
Attorneys for Appellee, Seaboard Air Line Railway Company.

[File endorsement omitted.]

211 *Citation in usual form showing service on Marx, Cunningham, Austin, Randolph, and Parker.*

Filed Nov. 3, 1923.

Clerk's Certificate.

United States of America,
Northern District of Georgia.

I, Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the fore-

going and attached 211 pages contains a true copy of the original record, the assignment of errors, and of all of the proceedings had, in the case of American Railway Express Company et al, complainants, against the United States of America et al, defendants, as designated in the præcipe filed therein, except that the original citation is attached hereto in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court at Atlanta, Georgia, this the 20th day of November, A. D., 1923.

[SEAL.]

OLIN C. FULLER,
Clerk, United States District Court
for the Northern District of Georgia.

O

No. 662

In the Supreme Court of the United States

October Term, 1913.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

v.

ATCHISON RAILWAY RECEIVING COMPANY AND ATCHISON TOP. AND SANTA FE RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE UNITED STATES.

CONTENTS.

	Page.
I. STATEMENT	1
Paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act, as amended (41 Stat. 585)	1
American Railway Express Co. v. *United States*, 293 Fed. Rep. 31	4
State of Tennessee v. *United States*, 262 U. S. 318	4
Commerce Court Act (Ch. 309, 36 Stat. 539, 542)	4
Urgent Deficiencies Act (Ch. 32, 38 Stat. 220)	5
II. THE FACTS	5
III. THE INTERSTATE COMMERCE ACTS	11
THE TERM "CARRIER BY RAILROAD" HAS A FIXED MEANING IN THE STATUTES AND ITS NONINCLUSION OF EXPRESS COMPANIES IS OBVIOUS	11
(A) THE CULLOM ACT OF 1887 (CH. 104, 24 STAT. 379)	11
As amended (Ch. 382, 25 Stat. 857)	13
(B) THE ELKINS ACT OF 1903 (CH. 708, 32 STAT. 847)	14
(C) THE HEPBURN ACT OF 1906 (CH. 3591, 34 STAT. 584)	14
American Express Co. v. *United States*, 212 U. S. 522	16
(D) THE COMMERCE COURT ACT OF 1910 (CH. 309, 36 STAT. 539)	19
(E) THE FEDERAL CONTROL ACTS (CH. 418, 39 STAT. 619, 645; CH. 25, 40 STAT. 451)	25
Proclamation issued by President Wilson for Federal Control of Railroads (40 Stat. 1734)	25
Proclamation issued by President Wilson for Federal Control of Express Company (40 Stat. 1889)	27
(F) THE TRANSPORTATION ACT OF 1920 (CH. 91, 41 STAT. 456)	28
Section 204 (41 Stat. 460)	28
Section 209 (41 Stat. 464)	28
Section 212 (41 Stat. 1145)	29
Section 300 (41 Stat. 469)	29
Section 400 (41 Stat. 474)	30
Section 402 (41 Stat. 476)	31
Section 404 (41 Stat. 479)	33
Section 405 (41 Stat. 479)	34
Section 406 (41 Stat. 480)	34
Section 407 (41 Stat. 480)	35
Section 418 (41 Stat. 485)	36
Section 422 (41 Stat. 488)	37
Section 435 (41 Stat. 493)	37
Section 439 (41 Stat. 494)	37
Section 441 (41 Stat. 497)	38

III. THE INTERSTATE COMMERCE ACTS—Contd. Page.

(G) OTHER ACTS TO REGULATE COMMERCE 39

The Safety Appliance Act (27 Stat. 531; 29 Stat. 85) 39

The Safety Appliance Act as amended (32 Stat. 943; 36 Stat. 298) 39

The Accident Reports Act (36 Stat. 350) 39

The Hours of Service Act (34 Stat. 1415) 39

The Ash Pan Act (35 Stat. 476) 39

The Transportation of Explosives Act (35 Stat. 1134; 41 Stat. 1444) 40

The Boiler Inspection Act (36 Stat. 913) 40

The 28-Hour Law (34 Stat. 607) 40

IV. DECISIONS 40

Wells Fargo & Company v. *Taylor*, 254 U. S. 175, 187 40

Express Rates, etc., 24 I. C. C. 380 41

Express Rates, etc., 28 I. C. C. 131 42

V. EXPRESS SERVICE AS DISTINGUISHED FROM CARRIER BY RAILROAD SERVICE 45

Express Rates, etc., 24 I. C. C. 380; 28 I. C. C. 132 45

Peoria & Pekin Union Railroad Company v. *United States*, decided January 7, 1924 46

VI. CONCLUSION 46

CASES CITED.

American Railway Express Co. v. *United States*, 293 Fed. Rep. 31 4

American Express Co. v. *United States*, 212 U. S. 522 16

Express Rates, etc., 24 I. C. C. 390 ..... 41, 45

Express Rates, etc., 28 I. C. C. 131 ..... 42, 45

Peoria & Pekin Union Railroad Company v. *United States*, decided January 7, 1924 46

State of Tennessee v. *United States*, 262 U. S. 318 4

Wells Fargo & Company v. *Taylor*, 254 U. S. 175, 187 40

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 666.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

v.

AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The question is: Is the American Railway Express Company, a corporation engaged in the transportation of property by express, a "carrier by railroad" within the meaning of paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act, as amended (41 Stat. 485)?

> (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon

complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route, where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water; and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any *carrier by railroad*, without its consent, to embrace in such route substantially less than the

entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

District Judges Ervin and Sibley concurring (Tr. 122), and Circuit Judge Bryan dissenting (Tr. 128), the District Court held American Railway Express Company is a *carrier by railroad* and accordingly enjoined (Tr. 121) the order of the Commission (Tr. 43) which directed that Company to establish and maintain through routes between all points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York, and all points on the line of that Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway,

from Washington to and including Birmingham, on the other, with transfer between the American Railway Express Company and Southeastern Express Company at Washington.

Rates not in excess of those then in force between the points over the routes now in use were directed to apply.

The bill was filed by American Railway Express against the United States (Tr. 1). Seaboard Air Line Railway Company intervened as a party plaintiff (Tr. 46, 50). The Commission filed an answer (Tr. 92), which was adopted by the United States (Tr. 94). Southern Traffic League, a commercial organization, many of whose members use the facilities of the two express companies (Tr. 95), also intervened and, as a party defendant, prayed the dismissal of the bill. Southeastern Express Company also intervened (Tr. 101), and, as a party defendant, answered and prayed the dismissal of the bill (Tr. 120). On the first hearing, September 19, 1923, a temporary restraining order was issued (Tr. 121). Subsequently, on October 11, 1923, a preliminary injunction was issued and the order was suspended. (293 Fed. Rep. 31; Tr. 121, 122.)

In No. 666 the United States and the Commission jointly appealed. In No. 667 Southeastern Express Company appealed and in No. 668 Atlanta Freight Bureau appealed. The appeals were taken under Sections 2 and the second proviso of Section 5 of the Commerce Court Act (36 Stat. 542, 543, Ch. 309), *State of Tennessee* v. *United States*, 262 U. S. 318, and

that clause of Urgent Deficiencies Act (38 Stat. 220, Ch. 32) which provides, "The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court."

By stipulation in No. 667 the full transcript was printed. In No. 666 and No. 668 the appeal papers only were printed. With the exception of the appeal papers, the transcripts are triplicates. Unless otherwise indicated all references are to the printed transcript in No. 667.

II.

THE FACTS.

American Railway Express Company is a consolidation of the business and property of the American, Adams, Southern, and Wells Fargo express companies, which was authorized by the Commission on December 7, 1920 (59 I. C. C. 459). It was the only express company in operation from July 1, 1918, to May 1, 1921, when the Southeastern Express Company opened its offices (Tr. 19).

American Railway Express Company (hereinafter called American) operates generally throughout the continental United States, and prior to the organization of Southeastern Express Company (hereinafter called Southeastern) had practically a monopoly of the express business. It had entered into a uniform contract with practically all of the railroad and water-line carriers of the United States (Tr. 74, 91).

The activities of the Southeastern are confined practically to all of that territory lying south of the Ohio and Potomac rivers and east of the Mississippi. It has 2,651 stockholders, most of them Southern business men (Tr. 31). It operates over the Southern Railway, Mobile & Ohio, Tennessee Central, Washington, Baltimore & Annapolis, and Maryland & Pennsylvania companies, embracing approximately 9,900 miles of railroad (Tr. 19), which serve Washington, Louisville, Cincinnati, Evansville, Cairo, St. Louis, Memphis, New Orleans, and Jacksonville. Practically all other carriers in the United States are utilized by the American. In the Southern States it operates over more than 30,000 miles of railroad (Tr. 19).

The complaints prayed that the express companies be required to establish universal joint through routes, rates, classifications, rules, and regulations (Tr. 18). The issues in the two complaints are identical. The Atlanta Freight Bureau; Southern Traffic League; Merchants Association of Concord, N. C.; Asheville, N. C., Chamber of Commerce; Western North Carolina Chamber of Commerce; Mobile Chamber of Commerce; and United States Fisheries Association intervened and introduced evidence. Other similar organizations intervened but introduced no evidence. All intervenors are of the opinion that it will be in the public interest that all direct routes be made available, that the shippers should have the right to route, and that through competition the public will obtain better express

service (Tr. 18). On and after May 1, 1921, the American ceased to operate over many routes that it had formerly used and in lieu thereof routes its traffic over lines which it operates. It attempted in all instances to procure either the entire haul or the longest possible haul, and in certain instances traffic was handled over circuitous routes (Tr. 19).

Since its organization American has voluntarily established through routes and joint rates with the Southeastern which are known and designated as "established routes" (Tr. 30). The Commission found that the American transfers some traffic to the Southeastern at Washington for transportation to certain Southeastern points and that the American can not be heard to say that there are no established routes to such points in connection with the Southeastern at Washington (Tr. 31). Rule 3 of the express classification now in effect provides that shippers by designation in writing may route shipments by way of such established routes and transfer points as they may desire, but the American has refused to obey such routing instructions and disregards Rule 3 (Tr. 30). The Southeastern, on the other hand, has observed routing instructions and sought to eliminate the circuitous routing (Tr. 31).

This controversy relates principally to traffic moving between points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, including New York City, and points in the Southeastern territory. Points of

receiving and delivery in that territory are known as "common," i. e., where a point is served by both companies; and "exclusive," i. e., where a point is served by only one.

The American operates each day to and through Southeastern territory over 235 car routes for which 313 cars are used daily, in which car lines operated wholly within this territory or from the border points to points wholly within the territory are not included. For its use 16 special express trains are operated daily, all of which handle express destined to Southeastern territory, and also 16 special trains in the reverse direction are operated from this territory to American exclusive points (Tr. 23). Evidence was introduced respecting routes and schedules covering practically the entire territory and numerous typical examples of routes and schedules are specifically pointed out in the report of the Commission (Tr. 23, 24, 25, 26).

About 15,000 tons of fish are taken each year from the waters in and adjacent to Southeastern territory. The members of the Southern Fisheries Association distribute these fish to various markets throughout the South, East, and West. From 60 to 70 per cent move via express. The Southeastern reduced its local rates on fresh fish and sea foods 10 per cent, and the members of the Southern Fisheries Association, whenever possible, use its services. Expedition is of great importance and Southern Fisheries Association, one of the complainants before the Commission, desires that all routes be open and that

the shipper have the right to route (Tr. 18). The Southeastern has attempted to concur in all the tariffs of the American with respect to rates and charges, rules and classifications, and provide for universal joint rates and routes. The American would not permit that, and by supplements effective May 1, 1921, limited its concurrence, and made applicable joint rates, charges, and routes only from exclusive offices of one company to exclusive offices of the other. The Southeastern was thus prevented participating in joint rates, charges, and routes between common points and exclusive American points, and between common points (Tr. 19).

The American claimed that the "common to exclusive office rule" is equitable because it prevents an express company from being short-hauled, eliminates another company's transfers at junction points, and minimizes the opportunity to route circuitously. The American shows that the Southeastern violates this rule a great many times each day and that a large number of these shipments are routed circuitously, resulting in delays of from 5 to 48 hours, and some times more. (Tr. 23.) The Commission found that express should be handled over reasonably direct routes, that if traffic were delivered to the Southeastern at a common point, and if there were a direct joint route, then it would not be unreasonable for the Southeastern to participate in such traffic. (Tr. 23.) The Commission further found that both companies would be on an equal footing if they competed for traffic destined to the other's exclusive

offices, but that they should be allowed to use only joint routes that are reasonably direct. (Tr. 23.)

The American claims that it is unreasonable, in view of its present service, to compel it to abandon any traffic to, or to share traffic with, the Southeastern. (Tr. 24.)

The Commission further stated that the testimony shows that the express service at common points has improved since the formation of the Southeastern, which is probably due to competition in service other than rates, as all the rates are under the block system, except the Southeastern's rates on fish. (Tr. 29.) Concluding, the Commission said: (Tr. 32):

> We are of the opinion and find that it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Company and points on the lines of the Southeastern Express Company, regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established, in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern

> Express Company and the other via the transfer point selected by the American Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings.

Compliance with the Commission's findings was left to conference between representatives, respectively, of the American and the Southeastern without satisfactory results. The subject then again came before the Commission and after a supplemental report the final order was entered which the District Court subsequently enjoined.

III.

THE INTERSTATE COMMERCE ACTS.

THE TERM "CARRIER BY RAILROAD" HAS A FIXED MEANING IN THE STATUTES AND ITS NON-INCLUSION OF EXPRESS COMPANIES IS OBVIOUS.

(A) THE CULLOM ACT OF 1887.

The Act to Regulate Commerce, approved February 4, 1887 (Ch. 104, 24 Stat. 379), did not include express companies. Section 1 provides, "That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, * * *." (Ch. 104, 24 Stat. 379).

Section 2. Unjust discrimination defined and forbidden: "Any common carrier subject to the provisions of this act" (24 Stat. 379).

Section 3. Undue or unreasonable preference or advantage forbidden: "Any common carrier subject to the provisions of this Act." Facilities for interchange of traffic: "Every common carrier subject to the provisions of this act" (24 Stat. 380).

Section 4. Long and short haul clause: "Any common carrier subject to the provisions of this act" (24 Stat. 380).

Section 5. Pooling of freights and divison of earnings forbidden: "Any common carrier subject to the provisions of this act" (24 Stat. 380).

Section 6. Printing and keeping open to public inspection schedules showing rates, fares, and charges: "Every common carrier subject to the provisions of this act" (24 Stat. 380). Freight carried through a foreign country to any place in the United States; printing and keeping open to public inspection schedules showing the rates: "Any common carrier subject to the provisions of this act" (24 Stat. 381). Filing of tariffs with the Commission, and changes therein: "Every common carrier subject to the provisions of this act" (24 Stat. 381).

Section 7. Continuous carriage of freight: "Any common carrier subject to the provisions of this act" (24 Stat. 382).

Section 8. Liability of common carriers for damages: "Any common carrier subject to the provisions of this act" (24 Stat. 382).

Section 9. Persons claiming to be damaged may elect either to complain to the Commission or bring suit in the United States courts: "Any common car-

rier subject to the provisions of this act" (24 Stat. 382).

Section 10. Penalties for violation of act: "Any common carrier subject to the provisions of this act" (24 Stat. 382).

Section 11. Penalty for false billing, etc., by carriers, their officers or agents: "Any common carrier subject to the provisions of this act" (25 Stat. 858). Penalty for false billing, etc., by shippers and other persons: "Any common carrier subject to the provisions of this act" (Ch. 382, 25 Stat. 858).

Section 12. Power and duties of Commission to inquire into business of carriers: "All common carriers subject to the provisions of this act" (24 Stat. 383).

Section 13. Complaints to the Commission against: "Any common carrier subject to the provisions of this act" (24 Stat. 384).

Section 16. Violation or refusal or neglect to obey order of the Commission: "Any common carrier, as defined in and subject to the provisions of this act" (24 Stat. 384).

Section 20. Commission may require annual reports: "All common carriers subject to the provisions of this act" (24 Stat. 386).

After describing in Section 1 "any common carrier or carriers" to which the provisions of the act shall apply, Congress adopted and used thereafter but one term to designate them.

(B) THE ELKINS ACT OF 1903.

An Act entitled "An Act to further regulate commerce," etc., approved February 19, 1903 (Ch. 708, 32 Stat. 847), provides that certain violations of the Act of 1887 shall constitute a misdemeanor "under said acts or under this act"; thus "the willful failure upon the part of any carrier subject to said acts to file and publish the tariffs" (Ch. 708, 32 Stat. 847). Rebating was also made unlawful "by any common carrier subject to said act to regulate commerce and the acts amendatory thereto" (32 Stat. 847). The penalty provisions included companies only and did not reach officers.

Section 3 provides for proceedings to enjoin or restrain departures from published rates and any discrimination prohibited by law and provides that whenever the Commission shall have reasonable ground for belief that "any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file," etc. (32 Stat. 848).

(C) THE HEPBURN ACT OF 1906.

The Act to amend the act entitled "An Act to regulate commerce," etc., approved June 29, 1906, enlarged section 1 so that the same now reads (Ch. 3591, 34 Stat. 584):

> That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad

* * * who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement, for a continuous carriage or shipment) * * *.

The term "common carrier" *as used in this act*, shall include express companies and sleeping car companies. The term "railroad," *as used in this act*, shall include all bridges and ferries * * * and also all the road in use * * * and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

92664—24—3

Wherever, therefore, the term "common carrier" subsequently appears in the act it includes the American Railway Express Company and the Southeastern Express Company. The comprehensive definition of the term "railroad" as used in the act immediately follows the provision which includes express companies within the term "common carrier."

Section 1 also provides, with certain exceptions, that "no common carrier subject to the provisions of this act" shall give any free pass or free transportation (34 Stat. 584). As applied to express companies, see *American Express Co.* v. *United States*, 212 U. S. 522.

Section 1 also forbids "any *railroad* company" to transport property owned by it and intended for its own use (34 Stat. 585). Obviously the "commodities clause" does not apply to express companies.

Section 1 also provides that "any common carrier subject to the provisions of this act," upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation shall construct, maintain, and operate upon reasonable terms a switch connection" (34 Stat. 585). It further provides that "If any common carrier shall fail to install and operate any such switch or connection as aforesaid" (34 Stat. 585) the shipper may make complaint to the Commission. Obviously that clause does not apply to express companies.

Section 6 of the Act to Regulate Commerce was amended by section 2 of the Hepburn Act (34 Stat. 586) and the term "That every common carrier subject to the provisions of this act shall file," etc.,

was retained. The section applies to the posting and publishing of tariffs, establishing through routes and joint rates, and changes and modifications of tariffs, etc. In one paragraph the terms "no carrier" and "any carrier" are used, and a proviso follows that whenever the word "carrier" occurs in this act it shall be held to mean "common carrier" (34 Stat. 587). Section 6 in its entirety obviously applies to express companies.

Section 1 of the Act of 1903 was also amended by the Hepburn Act (34 Stat. 587) so as to include not only "a corporation common carrier, subject to the Act to Regulate Commerce and the acts amendatory thereof," but it also includes "the transportation of any property in interstate or foreign commerce by any common carrier subject to the said Act to regulate commerce and the acts amendatory thereof" (34 Stat. 588), and "any persons, or any officer or director of any *corporation* subject to the provisions of this act, or the Act to regulate commerce and the acts amendatory thereof" (34 Stat. 588). This amendment is aimed at the failure to publish and file tariffs and the violation of published tariffs. Obviously it applies to express companies.

Section 15 of the Act of 1887 was amended by Section 4 of the Hepburn Act and authorized the Commission, upon complaint of "any common carrier" to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed as the maximum to be charged (34 Stat. 589). It further provides that the

Commission may determine divisions of rates and establish through routes and joint rates. It is not questioned that the section applies to express companies.

Section 16 of the Act of 1887 was amended by Section 5 of the Hepburn Act (34 Stat. 590) and provides that the Commission may award damages and make an order directing "the *carrier* to pay to the complainant" the sum to which he is entitled. In a suit to recover an award of damages it is provided that "all of the carriers parties to such order" may be joined as defendants (Ch. 3591, 34 Stat. 590). It is further provided that "If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money," application may be made to the court to enforce the order (34 Stat. 591).

Section 20 of the Act to Regulate Commerce was amended by Section 7 of the Hepburn Act (Ch. 3591, 34 Stat. 593), and provides "That the Commission is hereby authorized to require annual reports from all *common carriers subject to the provisions of this act*, and from the *owners of all railroads* engaged in interstate commerce as defined in this act * * *. The Commission may, in its discretion, * * * prescribe a period of time within which all *common carriers subject to the provisions of this act* shall have as near as may be a uniform system of accounts * * *" (34 Stat. 593). If "any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual

reports within the time above specified, or within the time extended by the Commission," it shall forfeit to the United States the sum of $100 for each day it shall continue in default (34 Stat. 593). The Commission may also prescribe the forms of any and all accounts and records to be kept by "carriers subject to the provisions of this act" (34 Stat. 594). The Commission shall also have access to all accounts, records, and memoranda "kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts * * *" (34 Stat. 594). Obviously these several provisions are as applicable to express companies as to railroad companies.

The provision in Section 20 as amended "That any *common carrier, railroad,* or *transportation company* receiving property for transportation" shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass (34 Stat. 595) is a decided departure from the previously used terms.

(D) THE COMMERCE COURT ACT OF 1910.

The Act to create a Commerce Court, approved June 18, 1910 (Ch. 309, 36 Stat. 539), further amends Section 1 of the Act to Regulate Commerce. The clause "The term 'common carrier' as used in this

act shall include express companies and sleeping car companies" (36 Stat. 545) was not changed. It also provided that "it shall be the duty of *every carrier subject to the provisions of this act* to provide and furnish such transportation upon reasonable request therefor," etc. The act also made it "the duty of all *common carriers subject to the provisions of this act* to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed" (36 Stat. 546).

Section 4 of the Act to regulate commerce was amended by Section 8 of the Commerce Court Act, and provided (36 Stat. 547) "That it shall be unlawful for *any common carrier subject to the provisions of this act* to charge or receive any greater compensation in the aggregate * * * for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance * * *."

While the designation of the carriers in the opening sentence remained unchanged, a very important clause was added which made a decisive distinction between a "*carrier by railroad*" and other carriers, thus: (36 Stat. 548) "Whenever a *carrier by railroad* shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be

found that such proposed increase rests upon changed conditions other than the elimination of water competition."

Here the specifically described *carrier by railroad* was designated as the object of special legislation to cure a well-known evil. Had the Congress intended to include express companies undoubtedly it would have used the term "common carrier." Ordinarily steamship lines carry the bulk and heavy commodities and few light packages; whereas, express companies carry small packages in great quantities and few of the bulk and heavy commodities. Obviously, therefore, by reduced rates, an express company could not drive a steamship line out of existence. The term "carrier by railroad" was deliberately intended to exclude express companies which, for the purpose of the Interstate Commerce Act, are included in the term "common carrier."

Section 6 of the Act to regulate commerce was amended by Section 9 of the Commerce Court Act (36 Stat. 548). It provided that "If *any common carrier subject to the provisions of this act*, after written request made upon the agent of such carrier * * * by any person or company for a written statement of the rate or charge applicable to a described shipment * * * shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission * * * the said carrier shall be liable to a penalty of two

hundred and fifty dollars." Immediately following is the provision that "It shall be the duty of every *carrier by railroad* to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; * * *." There again the words "carrier by railroad" are specially selected because, as is well known and the Court will take judicial notice of the fact, the larger volume of the articles carried by express are picked up at the factory, place of business, home, or other place of origin of the shipment and carried by the express company to the station. The express company could not post the names of agents on its wagons or at every point at which it may call for packages. Ordinarily the express company transacts little or no business with its shippers at the office of the railroad or steamship company as the actual carriage begins when the express company receives the package at its down-town office, or the factory, place of business, residence, or other place of origin of the package. Here again the term "carrier by railroad" was selected in order to exclude express companies.

Section 10 of the Act to Regulate Commerce was amended by Section 10 of the Commerce Court Act (36 Stat. 549). Section 10 provides penalties for violations of the act and while it retained the term "any common carrier subject to the provisions of

this Act," it added the words "or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation * * *" shall be guilty, etc. It further provides that "Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any *common carrier subject to the provisions of this Act*" shall make any false billing thereof, shall be deemed guilty of fraud (36 Stat. 549). The provision obviously applies to express companies.

Section 13 of the Act to Regulate Commerce was amended by Section 11 of the Commerce Court Act (36 Stat. 550). Section 13 provides for the filing of a complaint and uses the term "common carrier" throughout, which includes express companies.

Section 15 of the Act to Regulate Commerce was amended by Section 12 of the Commerce Court Act (36 Stat. 551) and retains the words "any common carrier or carriers subject to the provisions of this Act." Under the through route provisions the Commission shall not establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and *railroads* of a different character (36 Stat. 552).

That amendment contains the following provision (36 Stat. 552): "And in establishing such through

route the Commission shall not require any *company*, without its consent, to embrace in such route substantially less than the entire length of its *railroad* and of any intermediate *railroad* operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." Immediately following are the words, "In all cases where at the time of delivery of property to *any railroad corporation being a common carrier*, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established," the shipper is given the right to designate in writing which of the routes he prefers. There is also the proviso that the shipper shall in all instances have the right to determine "where competing lines of *railroad* constitute portions of a through line or route," over which his freight shall be transported (36 Stat. 553).

After finishing with through routes and the routing of traffic thereover, the Congress, in taking up the subject of the unlawful solicitation of information relating to shipments or the destination thereof, returns to its repeatedly used term and provides "It shall be unlawful for any *common carrier subject to the provisions of this Act*" or any officer, * * * authorized by such common carrier to receive infor-

mation therefrom, etc. (36 Stat. 553), unlawfully to disclose, etc.

Section 16 of the Act to Regulate Commerce was amended by Section 13 of the Commerce Court Act (36 Stat. 554) and throughout uses the term "carrier."

Section 20 of the Act to Regulate Commerce was further amended by Section 14 of the Commerce Court Act (36 Stat. 555). In the amendment the use of the term "any carrier, person, or corporation, subject to the provisions of this Act" is continued.

(E) THE FEDERAL CONTROL ACTS.

The Federal Control Acts clearly distinguish between express companies and railroads. The Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916 (Ch. 418, 39 Stat. 619, 645), provides in Section 1 thereof, as follows:

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of *any system or systems of transportation*, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment or for such other purposes connected with the emergency as may be needful or desirable.

On December 26, 1917, President Wilson issued the proclamation (40 Stat. 1733) for Federal Control of Railroads highly sweeping in its terms. The

President did "take possession and assume control * * * of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and *consisting of railroads*, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by *steam or by electric power*, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such *rail or combined rail and water system of transporation* (40 Stat. 1734).

On March 21, 1918, the Federal Control Act was passed and provided that "the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree * * *," etc. (40 Stat. 451, Ch. 25). Compensation for the use thereof was based on the "average annual *railway* operating income" for the three years ended June 20, 1917.

On March 29, 1918, the President, by Proclamation, authorized the Director General to execute in the name of the President the provisions of the Federal Control Act (40 Stat. 1763).

That the words "Each and every system of transportation and the appurtenances thereof * * *

consisting of railroads, * * * engaged in general transportation, whether operated by *steam or by electric power,*" etc., did not include the American Railway Express Company is conclusively shown, not only by the Federal Control Act, but also by the subsequent proclamation of November 16, 1918 (40 Stat. 1889), wherein and whereby the President, under Section 1 of the Army Appropriation Act, *supra*, did "take possession and assume control * * * of that certain system of transportation called the American Railway Express Company and all of its appurtenances and property of every kind or nature, directly or indirectly, owned, leased, chartered, controlled, or used in the conduct of, or in connection with, its express business" (40 Stat. 1889).

By the proclamation the Director General was to control and operate the company under the proclamations of December 26, 1917, and March 29, 1918, and under the Federal Control Act, approved March 21, 1918 (40 Stat. 451). The Director General was further authorized to perform his duties to such extent as he should determine under the contract already made between the Director General and the American Railway Express Company, dated June 26, 1918.

Thus the Government itself divided railroad systems of transportation and American Railway Express Company. That course was consistent with legislation by Congress from the beginning.

(F) THE TRANSPORTATION ACT OF 1920.

The Transportation Act of 1920 (Ch. 91, 41 Stat. 456), which provided for the termination of Federal control of railroads and systems of transportation, and for further amendment of the Act to Regulate Commerce, provided, by Section 200 thereof, that Federal control shall terminate at 12.01 a. m., March 1, 1920, and the President shall not have or exercise any of the powers conferred upon him by the Federal Control Act relating "to the use or operation of railroads or systems of transportation" (41 Stat. 457). By section 204, which provides for reimbursement of deficits during Federal control (41 Stat. 460), the term "carrier" is defined to mean "a *carrier by railroad* which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control."

By section 209, which provides for guaranty to carriers after termination of Federal control (41 Stat. 464), it is provided that the term "carrier" means (1) "a *carrier by railroad* or partly by railroad and partly by water, whose *railroad* or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic or connected with a *railroad* at any time under Federal control; and (2) a *sleeping-car company* whose system of transportation is under Federal control at the time Federal control terminates" (41 Stat. 464).

In the act of 1906 the term "common carrier" includes "express companies and sleeping-car companies." Here the term "carrier" is defined to include "carrier by railroad" and "sleeping-car companies." The obviously deliberate non-inclusion of express companies is significant.

Paragraph (i) of Section 209 of the Transportation Act (41 Stat. 467) contains full and complete provisions for settlement with American Railway Express Company, and may be divided under the heads (1) Guaranty; (2) Adjustment and restatement of operating revenues and expenses; (3) Payments on account of express privileges; (4) Payment of operating income into public Treasury for revolving fund; (5) Certificate of amount due; (6) Appropriation; (7) Advances on account of guaranty; (8) Repayment of excess advances.

By Section 212, added February 26, 1921 (Ch. 72, 41 Stat. 1145), providing for making certifications under Section 204 or Section 209, the Commission, if not at the time able finally to determine the whole amount due under such section "to a *carrier* or the American Railway Express Company," may make its certificate for any amount definitely ascertained, etc. The same words were subsequently again used in the same section, clearly indicating a distinction between *carrier by railroad* and the American Railway Express Company.

Title III of the Transportation Act—Disputes between carriers and their employees and subordinate officials—provides (41 Stat. 469), by section 300,

that the term "carrier" includes "*any express company,* sleeping car company, and any *carrier by railroad* subject to the Interstate Commerce Act." If, as the learned District Court held, the term "carrier by railroad" includes American Railway Express Company, then why did Congress use the words "any express company, sleeping car company, and any *carrier by railroad?*"

Title IV—Amendments to Interstate Commerce Act—Section 400 amends Section 1 of the Interstate Commerce Act and provides (41 Stat. 474):

> (3) The term "common carrier" as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; *express companies;* sleeping car companies; * * *.

It also provides that wherever the word "carrier" is used in this act it shall be held to mean "common carrier."

Paragraph (4) provides (41 Stat. 475):

> (4) It shall be the duty of every *common carrier subject to this Act* engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to

establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Paragraph (6) provides (41 Stat. 475):

> It is hereby made the duty of all *common carriers subject to the provisions of this Act* to establish, observe, and enforce just and reasonable classifications of property for transportation * * *.

Here the term "common carrier" clearly includes express companies as the term is so defined in paragraph (3). Section 402, which relates to car service, discards that term, thus:

> (10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property * * * by any *carrier by railroad* subject to this Act (41 Stat. 476).
>
> (11) It shall be the duty of every *carrier by railroad* subject to this Act to furnish safe and adequate car service, etc. (41 Stat. 476).
>
> (12) It shall also be the duty of every *carrier by railroad* to make just and reasonable distribution of cars for transportation of coal among coal mines served by it * * * (41 Stat. 476).

If, according to the opinion of the learned District Court and the counsel for the appellees, the term "carrier by railroad" includes express companies,

then the Commission has power to direct the American Railway Express Company to furnish cars to coal mines for loading and transportation of coal.

(13) The Commission is hereby authorized by general or special orders to require all *carriers by railroad* subject to this Act * * * to file with it from time to time their rules and regulations with respect to car service, * * *. (41 Stat. 476.)

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by *carriers by railroad* subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle, * * *. (41 Stat. 476.)

(16) Whenever the Commission is of opinion that any *carrier by railroad* subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may * * * make just and reasonable directions * * *. (41 Stat. 477.)

(17) * * * It shall be the duty of all *carriers by railroad* subject to this Act, * * * to obey strictly and conform promptly to such orders or directions of the Commission as it may make under paragraphs (15) and (16). (41 Stat. 477.)

(18) After ninety days after this paragraph takes effect no *carrier by railroad* subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any

line of *railroad*, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of *railroad*, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity * * * (41 Stat. 477), and no *carrier by railroad* subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment (41 Stat. 477, 478).

(20) * * * From and after issuance of such certificate, and not before, the *carrier by railroad may*, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate (41 Stat. 478.)

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any *carrier by railroad* subject to this Act * * * to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines (41 Stat. 478).

Section 2 of the Interstate Commerce Act was amended by Section 404 of the Transportation Act (41 Stat. 479) and retains the term "any common carrier subject to the provisions of this Act."

Section 3 of the Interstate Commerce Act was amended by Section 405 of the Transportation Act (41 Stat. 479) and, curiously enough, provides:

> (2) From and after July 1, 1920, no *carrier by railroad subject to the provisions of this Act* shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid. * * * (41 Stat. 479.)

Section 3 is further amended by the provision "*All carriers* engaged in the transportation of passengers or property subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines," etc. (41 Stat. 479.)

Thus, in the same section there are used the terms "no *carrier by railroad* subject to the provisions of this Act" and "*all carriers,* engaged in the transportation of passengers or property subject to the provisions of this Act." This was deliberate.

Section 4 of the Interstate Commerce Act was amended by Section 406 of the Transportation Act (41 Stat. 480), and retains the words "That it shall be unlawful for any *common carrier subject to the provisions of this Act*" to charge, receive, etc. However, the second paragraph of Section 406 provides, "Wherever a *carrier by railroad* shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such

rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

It is quite clear that if Congress intended to include express companies the term "common carrier" would have been used.

Section 5 was amended by Section 407 of the Transportation Act, and retains the term (41 Stat. 480) "it shall be unlawful for any *common carrier subject to this Act*" to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, etc.

Paragraph (2) of Section 407 provides (41 Stat. 481) that "Whenever the Commission is of opinion, after hearing, upon application of any *carrier or carriers* engaged in the transportation of passengers or property subject to this Act," the acquisition of control of one carrier by another may be made subject to the control of the Commission.

Paragraph (4) provides for the preparation and adoption of plans for the consolidation of "the *railway properties* of the continental United States into a limited number of systems" (41 Stat. 481).

Paragraph (6) provides (41 Stat. 481) that "It shall be lawful for two or more *carriers by railroad*, subject to this Act" to consolidate their properties under certain circumstances and conditions in the Act provided.

Section 15 of the Interstate Commerce Act was amended by Section 418 of the Transportation Act (41 Stat. 485), but the terms "any common carrier or carriers subject to this Act for the transportation of persons or property" and "such carrier or carriers subject to the provisions of this Act" were retained. Section 15 relates to complaints before the Commission and provides that "whenever, after full hearing, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any *common carrier or carriers subject to this Act* for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such *carrier or carriers* subject to the provisions of this Act, is or will be unjust or unreasonable," etc., the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable rates.

For paragraphs (3) and (4) (41 Stat. 485), see *ante*, 1.

In paragraph (4) the Congress used the terms "carrier by railroad" and "the entire length of its railroad." In substance, the District Court held that the term "carrier by railroad" was the equivalent of the term "common carrier" as used in Section 400 of the Transportation Act amending Section 1 of the Interstate Commerce Act and as used in Section 1 of the Act of 1906. It is respectfully submitted that such interpretation is not only contrary to the whole

purpose and theory of the Interstate Commerce Act but is contrary to the clear terms and provisions thereof.

Section 15–a of the Interstate Commerce Act was added by Section 422 of the Transportation Act. By paragraph (1) thereof it provides that, "When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto; the term 'carrier' means *a carrier by railroad*, or partly by railroad and partly by water within the continental United States, subject to this Act, excluding (a) sleeping car companies and *express companies* * * * (41 Stat. 488).

This was not a modification of the definition of "common carrier" as used in Section 1. It was the adoption of the term "carrier" and the definition thereof, which excluded express companies, for the purposes of the so-called guaranty, net return, and recapture of excess earnings clauses and for loans. The definition is limited solely to the purposes of Section 15–a.

Section 20, paragraph (5) thereof, of the Interstate Commerce Act, was amended by Section 435 of the Transportation Act and the amendment retained the term "*carriers* subject to the provisions of this Act" (41 Stat. 493).

Section 20–a was added to the Interstate Commerce Act by Section 439 of the Transportation Act and provides, "That as used in this section the term 'carrier' means a common *carrier by railroad* * * * which is subject to this Act, or any corporation or-

ganized for the purpose of engaging in *transportation by railroad* subject to this Act" (41 Stat. 494). The section relates to the issuance and the authority therefor of stocks, bonds, securities, obligations, and liabilities of railroad corporations.

Section 25 was added to the Interstate Commerce Act by Section 441 of the Transportation Act, and provides for the filing with the Commission of schedules of steamship companies showing rates and charges, ports, dates for receiving and loading of freight, dates of sailing, routes of vessels, and ports to which cargo will be carried. Paragraph (2) provides that, "Upon application of any shipper a *carrier by railroad* shall make request for, and the carrier by water shall upon receipt of such request name a specific rate applying for such sailing, and upon such commodity" (41 Stat. 497). Paragraph (2) further provides that, "The carrier by water, upon advices from a *carrier by railroad*, stating that the quoted rate is firmly accepted as applying upon a specifically named quantity of any commodity, shall, subject to such conditions as the Commission by regulation may prescribe, make firm reservation" for the space in the ship and shall so advise the carrier by railroad. The whole section clearly deals with rail and water transportation as the terms "carrier by railroad" and "rail transportation" are freely used.

Section 26 of the Interstate Commerce Act was added by Section 441 of the Transportation Act and provides that the Commission may, after inves-

tigation, "order any *carrier by railroad* subject to this Act" to install automatic train-stop or train-control devices or other safety devices (41 Stat. 498). Here is the use of the term "carrier by railroad" in connection with subjects which relate peculiarly to railroad equipment.

(6) OTHER ACTS TO REGULATE COMMERCE.

The Safety Appliance Act, March 2, 1893 (27 Stat. 531; 29 Stat. 85), (train brakes, automatic couplers, grab irons, and handholds) by Section 1 thereof, is directed to "any common carrier engaged in interstate commerce by railroad."

The Safety Appliance Act as amended (32 Stat. 943) "shall be held to apply to common carriers by railroads."

The Safety Appliance Act as amended (36 Stat. 298) (sill steps, hand brakes, ladders, running boards, and grab irons) "shall apply to every common carrier and every vehicle subject to the Act of March 2, 1893, as amended," *supra*.

The Accident Reports Act (36 Stat. 350) is directed to "the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad."

The Hours of Service Act (34 Stat. 1415) is directed to "any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad."

The Ash Pan Act (35 Stat. 476) provides that "it shall be unlawful for any common carrier engaged in

interstate or foreign commerce by railroad to use any locomotive," etc.

The Transportation of Explosives Act (35 Stat. 1134; 41 Stat. 1444) discards the term "carrier by railroad" and uses the term "a common carrier engaged in interstate or foreign commerce," which includes express companies.

The Boiler Inspection Act (36 Stat. 913) applies to "any common carrier or carriers * * * by railroad."

The 28-Hour Law (34 Stat. 607) does not use the term "carrier by railroad," but the carriers to which the act shall apply are carefully enumerated, that is to say, "That no railroad, express company, car company, common carrier other than by water" shall confine, etc. The court will take judicial notice that livestock is shipped by express.

IV.

DECISIONS.

In *Wells Fargo & Company* v. *Taylor*, 254 U. S. 175, 187, this Court held that the term "every common carrier by railroad" as it appeared in the Employers' Liability Act excluded express companies. In delivering the unanimous opinion of the Court, Mr. Justice Van Devanter said:

> In our opinion the words "common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public; that is to say, a railroad company acting as a common carrier. This view not

only is in accord with the ordinary acceptation of the words but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad (see *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 212–213); by the obvious reference in the latter part of Sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars, and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co.* v. *Wagner*, 241 U. S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown. 1 I. C. C. 349; *United States* v. *Morsman*, 42 Fed. Rep. 448; *Southern Indiana Express Co.* v. *United States Express Co.*, 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co.* v. *United States*, 212 U. S. 522, 531, 534.

In *Express Rates, etc.*, 24 I. C. C. 380, the Commission pointed out the evils resulting from express companies retaining "possession of the shipment so as to receive the longest possible haul via their own lines," holding that "expedition is the very soul of the express business" (24 I. C. C. 392), and finding that "For the cure of this most annoying, and one of the most frequent, causes of complaint against the

express companies, they should be required forthwith to establish and jointly publish through routes between the principal points in the United States, which routes shall follow the main lines of travel, the most direct in point of time measured by the schedule of those passenger trains by which normal schedules are observed." (24 I. C. C. 393; Tr. 28.)

In *Express Rates, etc.*, 28 I. C. C. 131, decided July 24, 1913, the Commission stated that the block system of stating rates was admitted by the carriers to be practicable and satisfactory, and as a result of its investigation the Commission was convinced that if unbearable discrimination and confusion were to be avoided its order must take into account the entire body of rates for express service and that in this respect the express service was not radically different from the services performed by the railroads in the carriage of passengers and property, and was more precisely comparable with the service performed for the public by the Post Office Department (Tr. 28, 29).

It was the purpose to treat all express companies as a unit forming one national express system, to have express move over direct routes, and to make the same rate applicable thereto regardless of the route over which it moved. It was in the public interest for the express business to receive treatment similar to the mail service. Accordingly, because the American had worked out other reasonable routes is not a sufficient reason for permitting reasonable routes, in connection with the Southeastern, to be closed (Tr. 29).

If the term "carrier by railroad" includes express companies, then does not that term also include all of the facilities by which the express business is conducted; and would not the terms "water line," "interurban railway," and any other facilities by which express business is conducted similarly include express companies?

If the term "carrier by railroad" includes American Railway Express Company, then it likewise includes any express carriage by motor truck, motorcycle, electric railway, airplane, water line, or any other form which it may choose to select to carry and deliver the packages. Such a construction is obviously not only unreasonable but utterly impracticable.

In order to reach its conclusion the learned District Court was obliged to re-cast the carefully selected and continuously used words of the statute, thus (Tr. 124, 126) (293 Fed. Rep. 34, 36)—

> In the case of the Interstate Commerce Act, Congress, by an amendment of June 29, 1906, brought pipe-line carriers under the Act by the simple declaration that "the provisions of this Act shall apply" to them. But to bring express and sleeping-car companies within it, it proceeded to *define the term* "carrier" otherwise than it had been construed by the Commission. The enactment was that the term "Common carrier as used in this Act *shall include* express companies and sleeping-car companies." This was a legislative reversal

of previous construction, whether by Commission, courts, or public. Effect must be given to it by making the term include those companies whenever used in the Act and its amendments. By so doing the words of the first section must read "common carriers including express companies and sleeping-car companies engaged in the transportation of passengers or property wholly by railroad, etc." Thereby *such* express companies as carry *property by railroad* and *such* sleeping-car companies as carry passengers *by railroad*, and only such, are made subject to the Act. * * * We feel constrained to hold that "Carrier by railroad" by the dictionary of the Act means here just what it did when first used by the Act of 1906, to wit: "Common carrier including express and sleeping-car company, which carries by railroad."

* * * * *

The case, indeed, is not one of ordinary construction in which the reasonable intent of Congress is to be gathered from the context, but is rather one of executing a positive legislative mandate defining terms. The only question is whether the provision of the statute can have any reasonable application under these definitions, and we think it can. Since "carrier" wherever used in the Act means "common carrier" and since "common carrier as used in this Act shall include express and sleeping-car company," "Carrier by railroad" in paragraph 4, Section 15, must be read "Common carrier, including express and sleeping-car company, by railroad." And so read

> the provision can reasonably be applied to an express company, and its transportation arrangements with and over railroads, referred to as "lines" in the end of the paragraph under discussion.

This action of the District Court in thus re-casting the statute is assigned as reversible error (No. 666, Tr. 3).

V.

EXPRESS SERVICE AS DISTINGUISHED FROM CARRIER BY RAILROAD SERVICE.

Express service as conducted throughout the United States and the peculiar characteristics thereof were fully investigated and considered by the Commission more than 10 years ago in its investigation styled "*In Re Express Rates, Practices, Accounts, and Revenues,*" 24 I. C. C. 380. Commissioner Lane wrote an elaborate report covering 161 pages. That report was followed by another written by Commissioner Marble, 28 I. C. C. 132.

The several separate express companies operated under the terms and conditions prescribed by those reports until the consolidation, which was accomplished in order that there might be further uniformity in conducting the highly expedited express business.

If affirmed, the decree of the District Court will simply throw back progress which has been the result of many years of study and experiment on the part of both the Commission and the express carriers.

The order of the Commission was annulled on the ground that the Commission erred as a matter of

law in holding that American Railway Express Company was not a "carrier by railroad" within the meaning of that term as used in paragraph (4) of Section 15 of the Interstate Commerce Act.

The Government prevailed on all other questions raised and argued before the District Court and no cross-appeal was taken. *Peoria & Pekin Union Railroad Company* v. *United States*, decided January 7, 1924.

VI.

CONCLUSION.

The District Court clearly erred in thus annulling the order and it follows that its decree should be reversed.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

○

FILED
MAR 23 192
WM. R. STANS
CLE

In Equity, No. 666.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS,

v.

AMERICAN RAILWAY EXPRESS COMPANY, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

FEBRUARY, 1924.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924

SUBJECT INDEX.

	Page.
STATEMENT	1–15
ARGUMENT:	
I. THE LOWER COURT ERRED IN HOLDING THAT EXPRESS COMPANIES ARE COMMON CARRIERS BY RAILROAD WITHIN THE MEANING OF PARAGRAPH (4) OF SECTION 15 OF THE INTERSTATE COMMERCE ACT	15–26
II. IN REQUIRING THE EXPRESS COMPANIES NAMED IN THE ORDER OF JULY 9 TO FILE TARIFFS PROVIDING FOR THE RIGHT OF SHIPPERS TO DESIGNATE THE ROUTING OF SHIPMENTS BY EXPRESS OVER ESTABLISHED THROUGH ROUTES, THE COMMISSION ACTED IN ACCORDANCE WITH AUTHORITY CONFERRED UPON IT BY PARAGRAPH (3) OF SECTION 15 OF THE INTERSTATE COMMERCE ACT	26–28
CONCLUSIONS	28–29

TABLE OF CASES CITED.

	Page.
Consolidation of Express Cos., 59 I. C. C. 459	5
Express Rates, Practices, Accounts, and Revenues, 24 I. C. C. 380, and 28 I. C. C. 131	21, 28
Interstate Commerce Commission v. *Northern Pacific Railway Company*, 216 U. S. 538	19
New England Divisions Case, 261 U. S. 184	14
Wells Fargo & Company v. *Taylor*, 254 U. S. 175	17, 23, 24

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, Interstate Commerce Commission, et al., Appellants, v. AMERICAN RAILWAY EXPRESS COMPANY, et al., Appellees.	In Equity, No. 666.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a decree of the District Court of the United States for the Northern District of Georgia, enjoining temporarily enforcement of an order of the Interstate Commerce Commission, dated July 9, 1923, the body of which reads:

> These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, under date of March 12, 1923, having made a report (78 I. C. C., 126), and on the date hereof, having made and filed a supplemental report, said reports containing its findings of

fact and conclusion thereon, which said reports are hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to establish, on or before October 20, 1923, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Co., from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Co. and the Southeastern Express Co. at Washington, D. C.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before October 20, 1923, upon like notice to this Commission and to the general public, and thereafter to maintain and apply to the transportation of shipments of express, rates between the points designated in the preceding paragraph which shall not exceed the rates contemporaneously in effect between said points over the routes now used, and that the tariffs shall provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed.

And it is further ordered, That this order shall continue in force until the further order of the Commission. (Rec. 43–44, No. 667.)

The order was made and entered by the Commission in proceedings pending before it on said July 9, numbered respectively 12784 and 12786. In describing the parties to the proceedings and the matters complained of therein, in its report of March 12, above mentioned, the Commission said:

> The Southeastern Express Co., hereinafter called the Southeastern, alleges that the failure of the American Railway Express Co., hereinafter called the American, to establish through routes and joint rates and charges on interstate express traffic, to observe the designation of routing by the shipper, and to establish just, reasonable, and equitable divisions of joint rates, is unduly preferential of the American's routes, unduly and unlawfully discriminatory against and prejudicial to the Southeastern's routes and to shippers desiring to use them, and results in lower rates to and from more distant exclusive points than those applicable to and from intermediate common points, in violation of sections 1, 2, 3, 4, 6, and 15 of the interstate commerce act. We are asked to prescribe joint through express routes and joint rates, charges, rules, and regulations for the operation of such joint through routes; to require that all available routes be kept open and that the same rate be made applicable between any two points regardless of the route of movement; and to

require the American to observe shippers' routing instructions, and permit the use of through express cars over joint routes whenever business makes it necessary. We are also asked to determine and fix just, reasonable, and equitable divisions of the joint rates and charges and order an adjustment to be made in accordance therewith on all shipments which moved under joint rates subsequent to May 23, 1921, the date the complaint was filed. At the hearing it was agreed that the entire question of divisions be reserved for future consideration.

Both express companies are defendants in the complaint of the Southern Fisheries Association. This complaint asks that the express companies be required to establish universal joint through routes, rates, classifications, rules, and regulations. The issues are identical with those presented in the Southeastern case. The complaints were consolidated at the hearing and this complainant was there treated as an intervener in No. 12784.

About 15,000 tons of fish are taken each year from the waters in and adjacent to Southeastern territory. The members of the Southern Fisheries Association distribute these fish to various markets throughout the South, East, and West. From 60 to 70 per cent move by express. The Southeastern reduced its local rates on fresh fish and sea foods 10 per cent, and the members of the Southern Fisheries Association, whenever possible, use its services. Expedition is of great importance, and this complainant desires that all

routes be open and that the shipper have the right to route.

The Atlanta Freight Bureau; Southern Traffic League; Merchants Association of Concord, N. C.; Asheville, N. C., Chamber of Commerce; Western North Carolina Chamber of Commerce; Mobile Chamber of Commerce; and United States Fisheries Association intervened and introduced evidence. The Macon, Ga., Chamber of Commerce; New Orleans Joint Traffic Bureau; Savannah Traffic Bureau; Jacksonville Chamber of Commerce; Jacksonville Traffic Bureau; and James E. Grady & Co. intervened but presented no evidence.

All the interveners are of the opinion that it will be in the public interest that all direct routes be made available, that the shipper should have the right to route, and that through competition the public will obtain better express service.

In June, 1918, as a war measure, the existing express companies were consolidated and the American, the defendant herein, was formed. We approved the continuation of this consolidation in *Consolidation of Express Cos.*, 59 I. C. C. 459, decided December 7, 1920. The American was the only express company in operation from July 1, 1918, to May 1, 1921.

The Southeastern was incorporated under the laws of Alabama in October, 1920, and opened its offices for business on May 1, 1921. It was formed principally by men who were either connected with or interested in the

contentions, the Commission reported findings and conclusions as follows:

> We are of the opinion and find that it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Co. and points on the lines of the Southeastern Express Co., regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Co. and the other via the transfer point selected by the American Railway Express Co.; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings.
>
> The American should cancel its restrictive schedules and the express companies should recognize as "established routes" the reasonable direct routes which they shall establish in accordance with our findings. Each express

> company, when traffic received by it is unrouted, should have the right to use the reasonable route which will give it the longest haul, but if the express is routed via "established routes" the routing instructions should be obeyed. The best way to provide for the establishment of routes may be for each company to have individual routing guides showing its selected routes. The shipper should then be allowed to route over any route contained in either guide. (Rec. 32–33, No. 667.)

At the time the Commission made its report of March 12, however, it refrained from making a formal order and left the express companies free to agree upon the establishment of through routes. In this connection the Commission said:

> It should not be difficult for the express companies to decide between themselves as to what routes are or are not reasonable. They could be aided by an arbitration committee with duties similar to those of the former direct-routing committee. We can not pass upon the reasonableness of all routes at this time. Express schedules are constantly changing. The express companies will be given an opportunity to comply with our findings herein. If it later becomes necessary we will pass upon those specific routes upon which the express companies fail to reach a satisfactory agreement. (Rec. 33, No. 667.)

Subsequent to said March 12, in a report submitted by them which is Exhibit 2 to the bill of complaint,

representatives of the express companies advised the Commission that they had been unable to reach an agreement in the premises, whereupon, after denying a petition for reargument and for modification of the report of March 12, and after suspending the operation of a tariff which was to become effective on July 14, 1923, filed by American Railway Express Company, appellee herein, the Commission made and entered the supplemental report and order of July 9, 1923. In said supplemental report the Commission made additional statements and reaffirmed the findings and conclusions contained in the report of March 12, as follows:

> We can require a carrier to perform only a reasonable act. The question of divisions over joint routes still remains for determination. The reasons set forth in the original report, including testimony of record that at competitive points the express service has improved because of competition, demonstrates that the additional joint routes from American exclusive points to common points are reasonable and in the public interest.
>
> It was our expectation that the principles laid down by us in our report would be complied with without the necessity of entering an order. It is now apparent that an order is necessary.
>
> We shall at this time by order prescribe certain through routes and joint rates with respect to which the record warrants the finding that they are reasonable and will require their establishment, reserving for further

consideration either upon the present record or upon further hearing the establishment of additional routes.

We are of the opinion and find that it is necessary and desirable in the public interest that through routes and joint rates applicable thereto be established between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, and New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Co. from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Co. and the Southeastern Express Co. at Washington, D. C.

We further find that the rates contemporaneously applicable between the above-named points over routes now used are and for the future will be just and reasonable rates for application over the routes herein prescribed.

We further find that the tariffs should provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed.

All findings herein are without prejudice to issues presented in Docket No. 13930, *Express Rates*, 1922, now pending before us. (Rec. 42, No. 667.)

Reasons advanced by appellees in support of their contention that the order of July 9 is invalid are

contained in paragraph 22 of the bill of complaint, and may be summarized as follows:

> 1. The order deprives appellee, American Railway Express Company, of its liberty and property without due process of law.
>
> 2. The order compels said appellee to short-haul itself, if required by shippers to do so.
>
> 3. The order is in conflict with paragraph (4) of section 15 of the interstate commerce act, which prohibits such short-hauling.
>
> 4. The order requires the establishment of through routes without providing for the divisions of joint rates applicable to such routes.

In its answer, the Commission denies that the order deprives appellee, American Railway Express Company, of its liberty or property without due process of law; denies that said appellee is a carrier by railroad, within the meaning of paragraph (4) of section 15 of the act, and denies the alleged effect of other matters advanced by said appellee in its bill of complaint, in support of its contentions that the order is invalid.

In a majority opinion, Circuit Judge Bryan dissenting, the lower court sustained said contentions only to the extent of holding that express companies are "carriers by railroad" within the meaning of paragraph (4) of section 15 of the interstate commerce act and that the order of the Commission involved herein is in conflict with the prohibition against short-hauling of carriers by requiring the establishment of through routes, contained in said paragraph.

Assignments of error filed on behalf of the United States and the Commission are six in number and are to the effect that the aforesaid holdings are erroneous.

Pertinent language contained in the majority opinion of the lower court is as follows:

> By paragraph 3 of section 15 of the amended interstate commerce act power is clearly given the Commission, either on complaint or on its own initiative, to establish through routes when deemed necessary or desirable in the public interest. When one sufficient through route already exists there can be no necessity for another in the strictest sense, but certainly another may be desirable in the public interest. The competition between the carriers interested in the routes is generally considered to be itself in the public interest, because better service is likely to ensue. The repeal by the act of June 18th, 1910, of the proviso which formerly prevented the enforced duplication of routes shows the Congressional intent that it should be allowed. We are not prepared to say the order is arbitrary or unreasonable because made avowedly to foster competition.
>
> Nor do we think the order infringes the constitutional guarantees to liberty and property in giving the shipper an election which may deprive the American Railway Express Company of its long haul. If otherwise valid, it is only a part of the system of regulation and of rate making to which public service companies consent or at least subject

themselves when they enter the business. Such regulation when done in the public interest and not arbitrarily is not unconstitutional. Besides it must be assumed that full justice will be done when the rate comes to be divided. (Rec. 123, No. 667.)

The objection to the order that it puts a route into operation without having first fixed the division of the rate is unsustainable. The record shows a waiver of the matter. Furthermore, the prefixation is not required by the interstate commerce act; *Railway Co.* v. *United States*, — U. S. —, decided February 19, 1923. And lastly the division can often be more justly made after some trial of the new route. (Rec. 127, No. 667.)

Whether the shipper's choice of routes when established follows as a necessary consequence of the establishment of them, or whether the Commission has power, under paragraph 3 of section 15, to provide for it as one of the "terms and conditions" on which the route is to be used, or whether the power is to be considered as given by an application to express companies of paragraph 8 of section 15, we do not find it necessary to decide. * * *. (Rec. 127, No. 667.)

We think the order transgresses the prohibition of par. 4 of section 15 of the interstate commerce act; * * *. (Rec. 123, No. 667.)

* * * We feel constrained to hold that "carrier by railroad" by the dictionary of the act means here just what it did when first used by the act of 1906, to-wit, "common carrier, including express and sleeping-car

company, which carries by railroad." (Rec. 126, No. 667.)

* * * Since "carrier" wherever used in the act means "common carrier" and since "common carrier as used in this act shall include express and sleeping-car company," "carrier by railroad" in paragraph 4 section 15 must be read "common carrier, including express and sleeping-car company, by railroad." And so read the provision can reasonably be applied to an express company, and its transportation arrangements with and over railroads, referred to as "lines" in the end of the paragraph under discussion. (Rec. 126, No. 667.)

* * * An interlocutory injunction will be granted, but without prejudice to the right of the Commission to enquire whether, because the existing routes are unreasonably long or for other cause particularly appearing, any of the proposed new routes can be established consistently with paragraph 4 of section 15 of the interstate commerce act, and if so to order their establishment. (Rec. 127–128, No. 667.)

ARGUMENT.

I.

THE LOWER COURT ERRED IN HOLDING THAT EXPRESS COMPANIES ARE COMMON CARRIERS BY RAILROAD WITHIN THE MEANING OF PARAGRAPH (4) OF SECTION 15 OF THE INTERSTATE COMMERCE ACT.

The contentions of appellees in connection with the subject matters covered by the above heading were answered by the Commission in its report of March 12, as follows:

> The American contends that if the route used by it is a reasonable one and gives the

same service in point of time as the joint route sought by the Southeastern we have no power to require the establishment of such joint route and require the American to short-haul itself, even if the joint route with the Southeastern be also reasonable.

Paragraphs (3) and (4) of section 15 of the interstate commerce act provide:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated * * *.

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini

of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established." * * *

The phrase in paragraph (3) "applicable to the transportation of passengers and property" includes express traffic. The limitation in paragraph (4) with respect to our power to establish through routes applies to "any carrier by railroad" only. The Southeastern claims that this phrase does not include express companies, and the American contends that it does.

In *Wells Fargo & Company* v. *Taylor*, 254 U. S. 175, the United States Supreme Court held that the term "common carrier by railroad" as used in the employer's liability act of April 22, 1908, does not include express companies. The court said:

"In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad, * * * and by the fact that similar words in the original interstate commerce act had been construed as including carriers operating railroads but not express companies doing business as here shown."

In discussing this case, the American urges that the question there considered was the application of the Federal employer's liability Act, which regulated the liability of railroads for personal injuries; that the present case deals with the express business which is a part of the franchise obligation of a railroad, and an act of Congress conferring administrative powers over express companies or carriers by railroad which has a broader and more general purpose; and that the part of the act under consideration has a purpose broad enough to include property carried by express.

The express company does not own or operate lines of railroad. In its business the separate lines of each railroad are not observed, but by contract the express company operates as a unit over the lines of the various companies. Section 15 (4) by its terms refers to "carriers by railroad," and does not include express companies. Nor can it be said that the principle there announced should be applied to express companies.

It is our conclusion that the provisions of paragraph (4) of section 15 do not apply to express companies, and it is unnecessary to discuss cases cited in which the courts and this Commission have applied the law in dealing with routes established and connections required to be made between "carriers by railroad."

Aside from the construction placed upon paragraph (4) of section 15, the American claims that under paragraph (4) of section 1, if it provides through routes and reasonable

> facilities for their operation, it has fulfilled its common-carrier duty to the public, and that we can not require it to establish additional joint through routes which would short-haul it.
>
> Prior to 1910 our authority to establish through routes was limited by the following language:
>
> "Provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."
>
> This limitation has now been removed, and we are required to establish through routes whenever deemed by us necessary or desirable in the public interest, and it is for us to determine on the basis of a proper record what express routes are reasonable and in the public interest. (Rec. 20–21, No. 667.)

The limitation upon its authority to establish through routes, which the Commission referred to as having been eliminated by the Mann-Elkins Act of June 18, 1910 (36 Stat. L. 539), was included in the Hepburn Act of June 29, 1906 (34 Stat. L. 584, 590).

This change in the authority over through routes conferred upon the Commission was made immediately after this court had applied the limitation mentioned, by its decision in *Interstate Commerce Commission* v. *Northern Pacific Railway Company*, 216 U. S. 538, and by making the change Congress manifested clearly an intention to clothe the Commission with authority to determine the number of through routes which should be established in a given case. Also, such intention is further evidenced by an amendment

to the interstate commerce act contained in the transportation act of February 28, 1920.

The fourth paragraph of section 15 of the interstate commerce act, as amended by section 12 of the Mann–Elkins Act, read as follows:

> And in establishing such through route, the Commission shall not require any *company*, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established. [Italics ours.]

Pertinent language of paragraph (4) of section 15 of the interstate commerce act, as amended by the transportation act, is:

> In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any *carrier by railroad*, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established. * * * [Italics ours.]

It will be observed that the word "company" contained in the Mann-Elkins Act, was changed by the transportation act to read "carrier by railroad."

Prior to the passage of the transportation act the authority of the Commission to require the establishment of through routes depended, among other things, upon whether the carriers had refused or neglected to establish voluntarily such routes, and by comparing the second paragraph of section 15 of the interstate commerce act, as amended by the Hepburn Act, with the third paragraph of said section, as amended by the Mann-Elkins Act, it will be seen that other limitations upon the authority of the Commission in connection with the establishment of through routes, which were included in the Hepburn Act, were eliminated by the passage of the Mann-Elkins Act. Formerly the authority of the Commission to require the establishment of through routes was limited by the words "when that may be necessary to give effect to any provision of this act," while, as above shown, the present authority of the Commission to require the establishment of through routes depends upon whether, in the opinion of the Commission, the establishment of such routes is "necessary or desirable in the public interest."

In its report of March 12 the Commission quoted at length from its reports in *Express Rates, Practices, Accounts, and Revenues*, 24 I. C. C., 380, and 28 I. C. C., 131, and called attention to the fact that action taken by it in those two cases was designed

to, and did, remedy the evils which had been brought about by an attempt on the part of each of the eleven express companies then in existence to secure to itself the longest possible haul of any express traffic delivered to it for transportation. The Commission stated that such efforts on the part of the express companies had resulted in great damage to the public interests, but that after the rulings made by the Commission in consequence of the circumstances and conditions developed by its investigations in those cases had been put in force the evils and detriment referred to disappeared.

The rules prescribed by the Commission required the express companies to join in the establishment and publication of through routes and joint rates and provide for a free interchange of express traffic at junction points.

The Commission further stated that after the consolidation of the express companies into the American Railway Express Co., appellee herein, the latter discontinued through routes which had formerly been used in connection with the transportation of express traffic and established other through routes, for the purpose of obtaining for itself the longest possible haul, and that this action on the part of said appellee brought into existence again the detriment to the public interests which the action taken by the Commission in the express cases mentioned was designed to and did remove and prevent.

In expressing its opinion that the public interests require that there shall be more than one through

route between important points of origin and destination, the Commission said:

> The testimony shows that the express service at common points has improved since the formation of the Southeastern. This improvement is probably due to competition. There is no competition as to rates because all rates are the same under the block system. The only exception to this is the Southeastern's rates on fish, referred to above, but they are applicable only to Southeastern local points. When fish originate at or are destined to American points the American rates apply. In considering competition, time is not the only important element. Competition tends to make each company improve its general treatment of the public, its practices, rules, and regulations in regard to its methods of doing business. Taking all of these things into consideration and the fundamental principles laid down in our two decisions in the Express case, we find as a fact that it is in the interest of the public to order established reasonably direct joint express routes. (Rec. 29–30, No. 667.)

As further tending to show that the ruling of this court in *Wells-Fargo & Company* v. *Taylor*, *supra*, has an important bearing upon the matter under consideration here, we call attention to the analogy as to jurisdiction which exists between the interstate commerce act and the Federal employers' liability act. Pertinent words contained in the former are:

"That the provisions of this Act shall apply to common carriers engaged in * * * The transportation of passengers or property wholly by railroad, * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia," etc., while in the latter it is provided, "That every common carrier by railroad while engaging in commerce between any of the several States or territories," etc.

It will also be observed that reasons set forth by this court, as hereinbefore shown, in its decision in the *Taylor case*, in support of its holding that an express company is not a carrier by railroad within the meaning of the Federal employers' liability act, namely, that, "This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad," harmonize with the definition of railroad contained in paragraph (3) of section 1 of the interstate commerce act, which is as follows:

> * * * The term "railroad" as used in this act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary

> in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

In considering paragraph (4) of section 15 of the interstate commerce act, it seems to us that the words "its railroad" are significant and indicate what is meant by "carrier by railroad." If an express company is a "carrier by railroad" what is "its railroad," and what is an "intermediate railroad operated in conjunction and under a common management or control therewith"? The language contained in said paragraph (4) appears to us to make plain the intent that a carrier by railroad shall be one which has a railroad. An express company merely uses or employs a carrier by railroad to transport express matter for it, not from origin to destination but from one railroad station to another, and does not "manage" or "control" or "operate" the railroad or any intermediate railroad. It also uses or employs carriers by water or by stage or motor to transport express matter for it, and before many years will doubtless use or employ carriers by air to transport a large part of the express matter. But it is not and will not be a carrier by railroad or by water or by stage or motors or by aircraft, and will still be subject to the interstate commerce act under section 1 of that act.

II.

IN REQUIRING THE EXPRESS COMPANIES NAMED IN THE ORDER OF JULY 9 TO FILE TARIFFS PROVIDING FOR THE RIGHT OF SHIPPERS TO DESIGNATE THE ROUTING OF SHIPMENTS BY EXPRESS OVER ESTABLISHED THROUGH ROUTES, THE COMMISSION ACTED IN ACCORDANCE WITH AUTHORITY CONFERRED UPON IT BY PARAGRAPH (3) OF SECTION 15 OF THE INTERSTATE COMMERCE ACT.

As hereinbefore shown, the lower court did not find it necessary to determine whether the Commission is authorized by paragraph (3) of section 15 of the interstate commerce act to require express companies to provide in their tariffs that shippers shall have the right to designate the routing of their shipments over established routes. In this connection, however, the lower court, among other things, said:

> Nor do we think the order infringes the constitutional guarantees to liberty and property in giving the shippers an election which may deprive the American Railway Express Company of its long haul. If otherwise valid, it is only a part of the system of regulation and of rate making to which public service companies consent or at least subject themselves when they enter the business. Such regulation when done in the public interest and not arbitrarily is not unconstitutional. Besides it must be assumed that full justice will be done when the rate comes to be divided. (Rec. 123, No. 667.)
>
> * * * Having concluded that the order before us is violative of paragraph 4 of section

> 15, it must be enjoined irrespective of whether the new routes, if established, would open an insistence of their use to the shipper or to the Southeastern Express Company. That one or the other or both should have the right to use them must be true or else the opening of them over the objection of the American Railway Express Company would be a quite idle performance. * * *. (Rec. 127, No. 667.)

The Commission stated that the right of the shipper to designate routing was a part of the system of express rates and practices prescribed by it in the express cases above mentioned; that by disregarding this right appellee, American Railway Express Company, is violating its own express classification, and that the Commission has power to require express companies to accord such right to shippers. The language of the Commission in this connection is:

> * * * The right of the shipper to designate routing was a part of the system of express rates and practices prescribed by us (e) in the cases herein referred to. The express companies themselves provide in their express classification that the shipper has a right to route. Under section 15 (3) we have not only the power to require through routes and joint rates, but also to prescribe the "terms and conditions under which such through routes shall be operated"; and under this power we may provide for the right of the shipper to route. Certainly the establishment of alternative through routes would be of no advantage

if the shipper has no right to direct that traffic shall move over such routes. (Rec. 31, No. 667.)

* * * The fundamental principles laid down in the *Express cases* were prescribed at a time when there were 11 express companies. They should be followed now. The fact that we expected express companies to establish the most direct routes regardless of their long haul, is shown by the following quotation taken from the first opinion, supra, page 411:

"We have said to these carriers in connection with the discussion of the establishment of through routes and rates that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own line, and that division shall be agreed upon which shall compensate the originating carrier for its sacrifice." (Rec. 29, No. 667.)

CONCLUSIONS.

We think the matters hereinbefore set forth show clearly that, in conferring upon the Commission authority to require the establishment by carriers of through routes, the Congress intended to, and did, make a distinction between railroad companies who operate railroads and express companies who do not, and also make manifest that, because of the differences in circumstances and conditions pointed out by the Commission, as aforesaid, between services performed by express companies on the one hand

and those performed by railroad companies who operate railroads on the other, such a distinction is proper and should be made. We are also of opinion that nothing contained in the record in this case indicates that in making the order of July 9 the Commission either acted in excess of the authority which had been conferred upon it by the Congress or in conflict with any provision of the Constitution of the United States.

We therefore insist that the decree of the lower court should be reversed and that this case should be remanded to that court with instructions to dismiss the bill of complaint.

Respectfully submitted.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

FEBRUARY, 1924.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 667

SOUTHEASTERN EXPRESS COMPANY, APPELLANT,

vs.

AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

FILED NOVEMBER 30, 1923

(29,977)

(29,977)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 667

SOUTHEASTERN EXPRESS COMPANY, APPELLANT,

vs.

AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

INDEX

	Original	Print
Complaint	1	1
Exhibit 1—Report of Interstate Commerce Commission No. 12784	31	17
2—Report of Southeastern Express Co. to Interstate Commerce Commission	51	33
3—Supplemental report of Interstate Commerce Commission No. 12784	58	39
4—Order of Interstate Commerce Commission No. 12784	62	43
Order for temporary stay, &c.	63	44
Proofs of service of complaint	65	45
Petition of Seaboard Air Line for leave to intervene	67	46
Order allowing intervention of Seaboard Air Line Railway Company	75	50
Exhibit A to Petition for Intervention—Uniform contract for express operations	76	51
Exhibits A to D—Group listings	112	74
Entry of appearance for Interstate Commerce Commission	122	92

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 21, 1924

	Original	Print
Answer of Interstate Commerce Commission	123	92
Entry of appearance for the United States	129	94
Petition of Southern Traffic League et al. for leave to intervene.	130	95
Order allowing intervention of Southern Traffic League et al.	140	101
Petition of Southeastern Express Company for leave to intervene	141	101
Order allowing intervention of Southeastern Express Co.	172	120
Temporary restraining order	173	121
Decree of injunction	174	121
Opinion, Sibley, J.	175	122
Opinion, Bryan, J., dissenting	183	128
Petition of Southeastern Express Co. for appeal	192	133
Assignment of errors	194	134
Order allowing appeal	200	137
Bond on appeal	202	138
Statement of evidence	204	138
Testimony of H. S. Marx	204	138
H. M. Smith	207	140
T. J. Anderson	208	140
Certificate to statement of evidence	214	144
Agreement to statement of evidence	215	145
Notices of appeal and service	216	145
Præcipe for record and service	220	147
Amendment to præcipe for record	225	149
Citation and service	226	149
Clerk's certificate	228	150

[fol. 1] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

AMERICAN RAILWAY EXPRESS COMPANY, Complainant,

vs.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT

To the Honorable the Judges of said Court:

American Railway Express Company brings its bill against the United States of America and humbly complaining, respectfully avers:

1. Your Orator is a corporation organized and existing under the laws of the State of Delaware. It is engaged in the transportation of property by express in interstate and intrastate and foreign commerce throughout the United States and has been engaged since the first day of July, 1918. It so operates over more than thirty thousand (30,000) miles of rail lines in that part of the United States lying south of the Ohio and Potomac Rivers and east of the Mississippi River, and its lines extend into and throughout the New England States, the State of New York, and as well throughout each [fol. 2] of the other States of the Union. Your Orator's organization was approved by the Interstate Commerce Commission by its order entered on the 7th day of December, 1920, the Commission then acting in pursuance of the authority conferred upon it by paragraph seven of Section 5 of the Interstate Commerce Act, as amended by Section 407 of the Transportation Act of 1920.

2. This is a suit of a civil nature in equity; the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars and arises under the Constitution and laws of the United States, and it is a proceeding under the Acts of Congress known as the Urgent Deficiencies act approved October 22, 1913 (38 Stat. 219), and the Commerce Court Act approved June 18, 1919 (36 Stat. 539), and the Interstate Commerce Act and amendments thereto.

3. Your Orator avers that heretofore the Southeastern Express Company filed its complaint before the Interstate Commerce Commission against your Orator; that the said Southeastern Express Company was and is a corporation under the laws of the State of Alabama but that the executive and corporate offices and headquarters and the office of its President and General Manager and its managerial headquarters are located in the City of Atlanta, County of Fulton and in the Northern District of Georgia. The Southern Fisheries Associ-

ation, a voluntary association having members thereof who are residents and citizens of Fulton County, Georgia, which is in the Northern District of Georgia, filed a separate petition against the American Railway Express Company, seeking the same character of relief that [fol. 3] was sought by the Southeastern Express Company. The said petition of the Southern Fisheries Association was consolidated with the complaint of the Southeastern Express Company, and said Association was treated as an intervenor in the case brought by the Southeastern Express Company; and the said Southern Fisheries Association became a party to the petition upon which the order herein complained of was granted. The Atlanta Freight Bureau, a corporation under the laws of the State of Georgia, having its principal office, residence and place of business in the City of Atlanta and in the Northern District of Georgia, and the Southern Traffic League, a corporation under the laws of the State of Georgia, having its residence and place of business in the City of Atlanta and in the Northern District of Georgia, intervened by permission of the said Commission and became parties to the petition of the Southeastern Express Company and the order of the Commission hereinafter mentioned and complained of was granted upon the petition of the aforementioned, and certain other parties, and this bill is brought to suspend or set aside the said order.

Your Orator avers that the Southeastern Express Company began the transportation of property by express in interstate, intrastate and foreign commerce on May 1, 1921, and that it now operates in such business over the lines of the Southern Railway Company and of the other railroads which form the group of railroads known as the Southern Railway System, including the Cincinnati, New Orleans & Texas Pacific Railway Company, the Alabama Great Southern Railroad Company, the New Orleans & Northeastern Railroad Company, the Georgia, Southern & Florida Railway Company, the Northern Alabama Railway Company, the Danville & Western Railway Company, the Carolina & Northwestern Railway Company, the Tallulah Falls Railway Company, the Harriman & Northeastern Rail- [fol. 4] road Company, the Hartwell Railroad Company, the Yadkin Railroad, the High Point, Randleman, Asheboro & Southern Railroad Company, the Atlantic & Yadkin Railway Company, the Macon & Birmingham Railway Company, the Columbia & Greenville Railroad Company and the Delta Southern Railway Company and as well over the lines of the Tennessee Central Railroad Company, the Washington, Baltimore & Annapolis Railway Company, the Maryland & Pennsylvania Railway Company, and the Mobile & Ohio Railroad Company, and certain other lines of railroad and steamship, embracing in all about ten thousand (10,000) miles of transportation lines. All of which lines are located in that part of the United States which lies south of the Ohio and Potomac Rivers and east of the Mississippi River, except certain of its steamship lines and the electric line of the Washington, Baltimore & Annapolis Railway Company and the steam railroad of the Maryland & Pennsylvania Railroad Company, the first of which operates from Washington to

Baltimore, a distance of about forty miles, and the other from Baltimore to York, Pennsylvania, a distance of about seventy-nine miles.

4. Your Orator avers that it operates over the lines of all of the railroad companies doing business in the southeastern section of the United States other than the railroads over which the Southeastern Express Company operates as aforesaid; that your Orator operates over said lines under contract uniform in character, said contract being known as "The Uniform Contract for Express Operations over Rail Lines"; that said uniform contract was accepted and executed by all of the Class 1 railroads of the United States, effective September 1, 1920, including the Seaboard Air Line Railway Company [fol. 5] and the lines operating in the southeastern portion of the United States; that the Southern Railway System lines refused to enter into such contract with your Orator, but, on the contrary organized said Southeastern Express Company; that your Orator operated over said Southern Railway System lines until May 1, 1921, on which date said Southeastern Express Company succeeded your Orator thereon.

Your Orator shows that when said Southern Railway refused to contract with it your Orator arranged with said Seaboard Air Line Railway to furnish it transportation for the express matter between Washington, D. C., and Atlanta, Georgia, Birmingham, Alabama, and other points on said lines, and in the territory contiguous thereto, and said Seaboard Air Line Railway runs special trains for the transportation of your Orator's express matter.

Your Orator further shows that if the order of the Commission herein complained of, becomes effective, and shippers exercise the right to route via the Southeastern at Washington, as is contemplated by said order, the effect will be to divert business from the Seaboard Air Line Railway to the Southern Railway to the great detriment of the Seaboard Air Line Railway and as well to the detriment of your Orator and to the other railroads over whose lines your Orator operates.

5. In the aforementioned petition to the Commission, the Southeastern Express Company alleged:

"That the American Railway Express Company, hereinafter for convenience called the American Company, a corporation created under the laws of the State of Delaware, is also a common carrier express company, engaged in the transportation of property by express, wholly by railroad, and partly by railroad and partly by water, [fol. 6] between points in the United States, and as such common carrier, is subject to the provisions of the Interstate Commerce Act," etc.

Your Orator avers that it is a common carrier express company engaged in the transportation of property by express in interstate and foreign commerce, wholly by railroad, and partly by railroad and partly by water, and that it is, therefore, a carrier by railroad, and because it is such a carrier by railroad it is subject to the jurisdiction

of the Interstate Commerce Commission, which is hereinafter referred to as the Commission.

6. Your Orator further avers that prior to May 1, 1921, it had filed with the Commission and had duly posted at its several stations, as required by law, schedules of rates applicable to and governing its charges for interstate and foreign transportation of property by express. In the month of April, 1921, the Southeastern Express Company filed with the Interstate Commerce Commission a tariff or supplement, wherein it offered to concur in the publication or filing of all express rates, schedules and supplements thereto, issued and filed by your Orator in so far as such schedules contained rates applying to local or joint transportation between points on the lines of the Southeastern Express Company, and to and from points on said lines from and to all points in the United States and Canada on the lines of your Orator and all other express companies parties to said tariffs. The Southeastern Express Company's purpose in filing said concurrence was to make it a party to all of the tariffs and schedules issued by your Orator, and to open all routes without regard to circuity of routing or delay in the handling of the traffic [fol. 7] which would be caused thereby, and without regard to the rights of your Orator to the long haul.

Concurrence by your Orator in such filing by the Southeastern Express Company would have left no restriction upon circuitous routing of express shipments in the large territory involved. Thereupon, your Orator filed a Special Supplement limiting the application of the tariffs shown therein, which attempted to prevent circuitous routing and to preserve to your Orator the long haul wherever it was practicable so to do without causing unreasonable circuity or undue delay in the handling of traffic. The Southeastern Express Company protested against the allowance of this Special Supplement, but notwithstanding the protest the Commission allowed it to go into effect. Thereafter, your Orator established a large number of joint routes with the Southeastern Express Company for use in both interstate and intrastate commerce. These routes have been established from time to time as the movement of traffic developed the necessity therefor, in order that traffic might be handled without unreasonable delay, and to meet changes in schedules. As to the routes established as aforesaid by your Orator the Interstate Commerce Commission has found that "as a result of these joint routes express now moves between these particular points over the most direct lines" (78 I. C. C. 129).

Your Orator is ready and willing from time to time to join in such additional through routes as may be necessary to provide delivery of the traffic to consignee without unreasonable delay. Your Orator avers that it was essential to the transportation of the interstate express traffic so as to avoid circuity of routing and delay in delivery, that your Orator proceed in this matter in the manner above outlined.

[fol. 8] 7. In the aforementioned petition the Southeastern Express Company prayed that the Commission establish "such through

routes and joint rates and charges applicable to the transportation of express traffic, so as to require that all available routes be kept open," etc., that is, that all possible routes might be kept open. This prayer of the said petition was in accordance with the position taken by the Southeastern Express Company at the time it filed its concurrences as aforementioned, and which made it necessary for your Orator to take the positions hereinbefore mentioned.

8. Your Orator further avers that it duly answered the said complaint of the Southeastern Express Company, and thereafter evidence was taken before an Examiner appointed by the said Commission, and a report was made by said Examiner, exceptions to which were duly filed by your Orator. Thereafter, a hearing was had on the said exceptions, whereupon the said Commission made a report, which said report was made public on the 7th day of April, 1923, copy of which is hereto attached and marked Exhibit No. 1, and the same is hereby made a part of this bill. Thereafter, each of the said two express companies appointed a committee for conference, as contemplated in the aforementioned report of the Commission. The said committees met in conference in the City of Washington, which meeting was attended by representatives of the Commission. The said committees made a joint report to the Commission of their acts and doings copy of which is hereto attached and marked Exhibit No. 2, and the same is made a part of this bill. Your Orator, as is shown in said report, of said Committee, was willing, and offered [fol. 9] in said Conference to surrender substantial rights in order that an agreement might be reached; but the Southeastern Express Company demanded that joint through routes be established between itself and your Orator from many points of origin to many points of destination between which your Orator had and has reasonable and satisfactory routes and was and is rendering reasonable and satisfactory service over the same; and it also demanded the establishment of many other joint routes which would require your Orator to short-haul itself without benefit to the public, and although your Orator was and is rendering reasonable and satisfactory service over another route which provided a different point of transfer and gave your Orator a longer haul.

9. Your Orator filed with the Commission its application for rehearing, reargument, reversal or modification of the Commission's aforementioned report. The said application was filed on or about the 31st day of May, 1923, to which said application response was made by the Southeastern Express Company. Thereafter, the Commission denied your Orator's said application and made a supplemental report, which was dated the 9th day of July, 1923, copy of which is hereto attached and marked Exhibit No. 3, and said supplemental report is made a part hereof, reference to which is prayed as often as may be necessary; and on the same date the Commission entered an order in the said case of Southeastern Express Company, which embraced, as did the aforementioned report and supplemental report the case of Southern Fisheries Association vs. American Railway Express Company, et al., which was the Commission's Docket

No. 12786. Copy of the said order is hereto attached and marked [fol. 10] Exhibit No. 4, and the same is made a part of this bill. No order was entered by said Commission until the 9th day of July, 1923. Your Orator now complains of the last mentioned order.

10. Under the said order your Orator is:

"Notified and required to establish, on or before October 20, 1923, upon notice to this Commission and to the general public by not less than thirty days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Company, from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Company and the Southeastern Express Company at Washington, D. C.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before October 20, 1923, upon like notice to this Commission and to the general public, and thereafter to maintain and apply to the transportation of shipments of express, rates between the points designated in the preceding paragraph which shall not exceed the rates contemporaneously in effect between said points over the routes now used, and that the tariffs shall provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed."

[fol. 11] 11. Your Orator avers that it has 334 offices in the State of Maine, among the principal ones of which are Augusta, Bangor, Bath, Biddeford, Cornish, Gardiner, Kennebunkport, Lewiston, Portland and Waterville:

That it has 234 offices in the State of New Hampshire, among the principal ones of which are Berlin, Concord, Dover, Keene, Manchester, Nashua and Portsmouth:

That it has 187 offices in the State of Vermont, among the principal ones of which are Bennington, Burlington, Montpelier and Rutland:

That it has 490 offices in the State of Massachusetts, among the principal ones of which are Attleboro, Boston, Brockton, Brookline, Cambridge, Fall River, Framingham, Gloucester, Haverhill, Holyoke, Lynn, New Bedford, Pittsfield, Springfield and Worcester:

That it has 85 offices in the State of Rhode Island, among the principal ones of which are Center Falls, Cranston, East Providence, Lincoln, Newport, Pawtucket, Providence, Warwick and Woonsocket.

That it has 233 offices in the State of Connecticut, among the principal ones of which are those at Bridgeport, Bristol, Danbury, Hartford, Meriden, New Britain, New Haven, New London, Norwalk, South Norwalk, Stamford, Wallingford and Waterbury:

That the City of New York is the largest city in the United States

and your Orator maintains therein enormous facilities and a very great organization for the conduct of its express business.

Your Orator employs in the conduct of its express business in the states mentioned in this paragraph substantially the number of employees set opposite the respective states, and pays to said em-
[fol. 12] ployees substantially the compensations there indicated, to-wit:

State	No. of employees	Est. amt. of annual compensation
Maine	428	$657,203.16
New Hampshire	232	340,135.32
Vermont	283	416,650.20
Massachusetts	3,395	5,449,158.36
Rhode Island	495	784,933.68
Connecticut	823	1,218,121.32

Your Orator employs in said states in connection with the several railroads over which it operates, a large number of persons who are compensated upon a commission basis or upon a basis of joint compensation. These employees are not included in those hereinbefore mentioned although they constitute a material part of the organization of your Orator.

In the City of New York it employs in such business approximately 10,357 persons whose annual compensation amounts to approximately $16,389,985.32. These latter figures do not include the populous metropolitan territory adjacent to New York City, but which either is or may be affected by said order.

Each of the officers in the above mentioned states, and as well each of the offices of your Orator throughout the country, is equipped with the necessary stationery, trucks, scales and other equipment needed in the conduct of your Orator's business, and many of said offices maintain a pick-up and delivery service, in which horses, wagons or motor vehicle trucks are used, with the necessary complement of employees.

[fol. 13] 12. In the City of Boston, Massachusetts, your Orator owns real property and equipment used in the handling of its express business which cost not less than $1,278,329.74. In the City of New York, N. Y., it owns like property so used which cost not less than $7,433,462.18. In the City of Philadelphia, Penna., it owns like property so used which cost not less than $941,056.57. In the City of Atlanta, Georgia, it owns like property so used which cost not less than $270,941.11. In the City of Birmingham, Alabama, it owns like property so used which cost not less than $80,793.88. And the said properties are now of a value not less than the amounts above stated.

It employs in the City of Boston an average of approximately 1,655 persons; in Philadelphia, Pa., an average of approximately 1,802 persons; in the City of Atlanta, Ga., an average of approximately 667 persons, in the City of Birmingham an average of approximately 227 persons. All of said employees are used in Orator's

organization, which is made up for the transportation and handling of express traffic.

Your Orator avers that it operates from New York to Washington over the Pennsylvania Railroad, passing through the States of New Jersey, Pennsylvania, Delaware, and Maryland, into the District of Columbia. That it likewise operates between those two points over the Baltimore & Ohio Railroad, passing through the same States. Some of the cities through which it passes from New York to Washington are Jersey City, Elizabeth, Newark, New Brunswick, Trenton, Philadelphia, Wilmington and Baltimore, at each of which said places your Orator maintains a large force of employees and a large amount of equipment, and sufficient offices and office space for the purpose of conducting its business. For the four months ending [fol. 14] April 30, 1921, your Orator paid in salaries and wages, including terminal expenses, at New York, the sum of $6,310,397.00; and at Boston, the sum of $1,022,426.00; at Philadelphia, the sum of $1,020,055.00; that it expended in proportion in the other large terminals in the territory mentioned. For the same period it expended in Atlanta for like items the sum of $333,404.00; and in Birmingham, the sum of $117,604.00. That these items are not the only items of expense at these points which your Orator has in the conduct of its business. It has many other items of expense such as the maintenance of motor vehicles, the payment for gasoline and other motor fuels, the payment of the maintenance and upkeep of offices and taxes and other salaries, rentals and expenses which are not included in terminal items. These figures are fairly indicative of the rate of like expenditures now being made by your Orator at the aforementioned offices and in the aforementioned territory, and which it must continue to make therein.

13. Your Orator has expended up to November, 1921, for property and equipment used by its operating departments at thirty-five large cities the sum of $23,739,889.49; and it then maintained substantially 28,000 offices throughout the United States. The property and equipment last above referred to, with the additions thereto, are now of a value of not less than $23,739,889.49, and its total offices now maintained are substantially the same. Your Orator's terminal expenses are exceedingly heavy; for the four months' period ending April 30, 1921, in only twelve of the largest cities, these aggregated $18,561,821.00, and the total average number of employees of your [fol. 15] Orator at those places during that period was 27,032. The said expenses of your Orator are now amounting to about the same relative sums, and the number of employees is substantially the same. The above mentioned expenditures and the above mentioned employees include only those in twelve of the largest cities of the United States.

14. Your Orator further shows that there is a large volume of express business which moves from points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut, and from New York, N. Y., and from the points on the direct routes

of the American Railway Express Company between New York and Washington, to points in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee and Kentucky, which business originates on the lines of your Orator and as to which business your Orator is the originating carrier.

In order to handle this business efficiently, and with the earliest possible delivery to the consignee, your Orator has established and maintains an efficient organization and express service; and the Commission has found in its said decision, (78 I. C. C. 131) that your Orator has expended large sums for property and equipment and has gone to considerable expense to perfect its organization and facilities and to maintain the same. The Commission has stated in 78 I. C. C. at page 133, that:

"The American operates each day to and through southeastern territory over 235 car routes, for which 313 cars are used daily. No car lines operated wholly within this territory or from the border points of Washington, Louisville, Evansville, and Jacksonville to points within the territory are here included. For its use 16 special [fol. 16] express trains are operated daily, all of which handle express, destined to southeastern territory, and also 16 special trains in the reverse direction are operated from this territory to American exclusive points."

Your Orator further shows that much of said traffic passes through Washington, D. C.; that to divert said traffic from your Orator's service and transfer it to the Southeastern Express Company at Washington would require your Orator to re-arrange its facilities and equipment, and in many instances install additional equipment.

15. The Commission finds that:

"Express from New York and other eastern points to Atlanta is handled by the American in through express cars. Express that is picked up in New York on Monday leaves New York at 11:00 P. M. on the Pennsylvania and reaches Washington at 6:25 A. M. over the Seaboard and reaches Atlanta at 6:00 A. M., central time, Wednesday. This traffic, prior to May, 1921, was handled over the Southern, but did not reach Atlanta until 11:00 A. M. Wednesday. The Southern's schedule has been changed and its train now reaches Atlanta at 5:25 A. M. * * * The traffic from New York to Atlanta is somewhat exceptional" (78 I. C. C. 133, 134). Atlanta is a point on the main line of the Southern Railway Company between Washington and Birmingham, Alabama.

Thus the Commission has found that the American's service gives practically the same arrival in Atlanta as can be given by the Southern (delivery to the consignee is the same via either route) and that the New York-Atlanta business is exceptional. But the Commission [fol. 17] does not make an exception of this business from its order but requires your Orator to transfer business to the Southeastern at Washington, thus depriving your Orator of its long haul without

lawful reason therefor and without legitimate benefit to the shipping public.

The Commission further finds that delivery to the consignee is the same over either the American or Southeastern lines to Greensboro, Charlotte and Concord (78 I. C. C. 135), but nevertheless the Commission's order requires your Orator to surrender traffic for these points to the Southeastern at Washington, thus depriving your Orator of the long haul without any legitimate benefit to the consignee or the shipper.

The Commission has held that additional through routes and joint rates which deprive your Orator of the long haul must be maintained "regardless of the fact that one company (your Orator) may have a reasonable direct single-line route, or join in a reasonable direct joint-route via another junction which allows it a longer haul" (78 I. C. C. 143).

Your Orator avers that about two hundred thousand (200,000) shipments now move in express transportation over your Orator's lines from New York, N. Y., destined to Atlanta, Georgia, each year, and that the gross revenue from said shipments is in excess of Three Hundred Fifty Thousand ($350,000) Dollars. All of said business can be and is handled over your Orator's own lines all the way from New York to Atlanta giving as good or better service as can be given by the proposed two-line route and giving as early or earlier delivery to consignee as can be given by such two-line route. If said order is permitted to become effective then all of said business will be subject to shipper's routing, whereby your Orator may be deprived of the haul thereon from Washington to Atlanta and of the revenue at- |fol. 18| tributable to such haul, and your Orator will be put to the expense not now incurred of transferring the same to the Southeastern at Washington. If your Orator undertakes to solicit shippers to prevent such routing orders or to procure routing over its own lines then it will be necessary for it to incur great expense in the organization and maintenance of a force of solicitors.

Your Orator further shows that shippers in New York ship to purchasers of their goods in Atlanta and if the purchasers in Atlanta direct the shipper to route their purchase via the Southeastern at Washington the shipper has no alternative but to comply. Therefore it would be necessary for your Orator to maintain additional forces of solicitors in Atlanta as well as in New York.

Your Orator avers that the Commission has found in its opinion in the case of the Southeastern Express Company against the American Railway Express Company that where the American Railway Express Company already has an established, reasonable route from an exclusive point on its line to a point common to it and the Southeastern Express Company, the Commission has the power to establish another through joint route by the American and the Southeastern, and to empower the shippers to route their shipments over such through route, and thus put it in their power to short-haul the American Company; and the Commission has found in the language of Section 15 (3) of the Interstate Commerce Act that such a joint

route is "desirable in the public interest," because having two routes under circumstances stated promotes competition between the two express companies. Your Orator alleges that the Commission has no power or authority to make or manufacture competition between carriers. Where a carrier has a reasonable established route between [fol. 19] two points on its own line, the Commission has no power to stop the traffic and turn it over to another carrier at an intermediate junction point, and thus create competition by taking away traffic from one carrier and giving it to another. In other words: the Commission cannot by its own order produce a state of competition by taking away from a carrier traffic which it is lawfully carrying and turn it over to another carrier, and call this competition, and justify its order by finding that competition is "desirable in the public interest." Nor can the substance of the transaction be disguised by making two routes and giving to a shipper the option as to which route he will use. As to traffic originating at an exclusive point on the lines of your Orator destined to an exclusive point on the lines of the Southeastern, short-hauling your Orator does not create or promote competition between the two express companies, but simply cuts down the length of the haul of the American and correspondingly increases the length of the haul of the Southeastern and causes an unnecessary loss of revenue of the American and thus deprives the American of its property without due process of law.

18. Your Orator avers that where a carrier has a reasonable established route between two points on its own line, when traffic is offered it for shipment from one of said points to the other, the carrier cannot lawfully be compelled to turn that traffic over at an intermediate point to another carrier to be carried by the latter to destination, especially as under Section 20 (11) of the Interstate Commerce Act the initial carrier is liable to the shipper through to destination. Under these circumstances to take the traffic from one carrier and to give it to another with the consequent division of [fol. 20] revenue is equivalent to taking property of the former without due process of law contrary to the Fifth Amendment. In view of the Fifth Amendment to the Constitution of the United States Congress cannot constitutionally take away these rights by conferring upon the Commission power to create joint routes whenever the Commission may find such joint routes "desirable in the public interest."

19. Your Orator avers that the traffic affected by this order consists of many units or separate shipments. They originate at a great many points of origin and are transported to a great many destinations. These shipments run into several thousands each month. The average transportation charge upon an express shipment at the present time is somewhat less than Two ($2.00) Dollars. The division of revenue must be made, if the order complained of goes into effect, upon each one of those shipments which are diverted from your Orator's lines of railway. The basis of division is not fixed in this order. If this order goes into effect, the accounting

therefor between your Orator and the Southeastern Express Company as to the traffic affected thereby will present a problem of extreme difficulty and great expense. The amounts of money involved which may become due to your Orator from the Southeastern Express Company may in the aggregate be extremely large, coming to more than the entire capital and assets of the said Southeastern Express Company.

20. Your Oator avers that none of the routes and schedules which your Orator is using for the transportation of its express shipments [fol. 21] from the territory mentioned in the said order to the destinations there referred to have been found by the Commission to be unreasonable. On the other hand, the Commission has found that:

"Because the American has worked out other reasonable routes is not a sufficient reason for permitting reasonable routes in connection with the Southeastern Express Company to be closed."

That is, that the American Company can be required, and is, by the order herein complained of, to be required, to surrender the traffic originated by it at points intermediate to points of destination, although it has reasonable routes and reasonable schedules to destination and is rendering reasonable service thereon. That it may be likewise required to deliver traffic which it has originated which is destined to points on the lines of the Southeastern Express Company at a place of transfer nearer point of origin than the point of transfer selected by your Orator, although the route made through the point selected by your Orator, which is nearer the point of destination and which gives to your Orator the longer haul, is reasonable and provides the same delivery to the consignee as would be provided by the route which requires transfer at a point nearer the place of origin and which short-hauls the originating carrier.

21. Your Orator gives the following as an illustration of some results which will be produced if the order here complained of is allowed to become effective:

Your Orator picks up a shipment in New York which is to move by express therefrom and which is destined to Atlanta, Ga. For [fol. 22] picking up this shipment a motor vehicle is used, and for this service a very large fleet of motor vehicles, with their complement of employees, is always at hand. After the shipment has been picked up, it is carried to an assorting station, where it is assorted according to its destination. It is then carried to the Pennsylvania Railroad station in New York. It is labelled, waybilled and loaded in a through car and into a through train. It is loaded within the space in that car with reference to the unloading thereof.

The expense of handling shipments in New York is very great. Under the plan which is proposed by the Commission, the shipper may direct that this shipment be segregated from shipments not routed by shipper and be transferred to the Southeastern at Washington regardless of the fact that it will not, in ordinary course, reach the consignee any earlier than if it had been retained by the orignat-

ing carrier—your Orator; and regardless of the fact that such transfer deprives your Orator of a haul of about six hundred and fifty miles, and leaves to it a haul of only about two hundred and twenty-six miles out of a total haul of about 876 miles, all of which can be and is covered by your Orator without delay to the consignee, and for which your Orator has made all of the arrangements necessary to provide accommodations at terminals and on the railroad tracks and roadbeds of the Pennsylvania Railroad, the Richmond, Fredericksburg & Potomac Railroad and the Seaboard Air Line Railroad, with all of the necessary complement of cars, crews, express messengers, helpers, locomotive engineers, and all of the things necessary to make up the successful operation of a train; and the schedule of this train has been timed so as to coordinate it with the schedules of connecting trains; and your Orator must be continuously prepared to handle this traffic, for it can never know what will be [fol. 23] left in its cars and what will be taken out of them through shipper's routing so it must always be prepared to handle the maximum traffic.

Other illustrations of the same kind running to more distant destinations and to nearer ones may be given. In each of these instances your Orator is prepared to render full service; has made the organization for the full handling of the shipment; has procured the equipment and the use of roadbed, rolling stock and engines and has made the organization of men and material and has coordinated its schedule with other schedules in order that the shipments may make the best time; yet under this order it may be required to give up this traffic.

22. Your Orator avers that the aforementioned order of the Commission dated the 9th day of July, 1923, is erroneous, invalid, unlawful and void for the following reasons:

A. For that it is in violation of the Constitution of the United States, and especially the Fifth Amendment thereto, for that it, in the manner herein described, deprives your Orator of its liberty and property without due process of law.

B. The said order of the Commission does not conform to the statutory authority of the Commission in this: The Commission can require a carrier to perform only a reasonable act. The said order, if it becomes effective, will require your Orator to do unreasonable and unjust acts for that it will require your Orator to short-haul itself in circumstances that are not contemplated or authorized or required by law; and it will, if effective, require your Orator to surrender its revenues, to use its properties of great value, and to incur great expense, as has been hereinbefore set out, for the picking up, handling, transporting and delivery of express traffic in interstate commerce, and will then require your Orator to un- [fol. 24] necessarily surrender this traffic at an intermediate point far short of destination, though your Orator has provided and is using and operating for the transportation of this traffic reasonable and adequate lines of express transportation, wholly by railroad or

partly by railroad and partly by water, and is furnishing equipment and service for the picking up, assorting, waybilling, loading, handling, transporting and delivery of such traffic from point of origin to point of destination; and as to other traffic it will, if effective, require your Orator to surrender such express traffic to a competing carrier at a point intermediate points of origin and destination, which will unnecessarily short-haul your Orator, the originating carrier, although your Orator has provided and is operating the lines of express transportation, as above set out, and over which it is rendering as to such traffic proper and reasonable service, which will enable it to transport said shipments to a point nearer destination than the transfer point specified in said order; and your Orator will therefore be required to unreasonably and unnecessarily divide its revenues arising from such traffic; and said order, if effective, will require your Orator to provide equipment, offices, buildings, cars, roadways, rails, engines, motive power and employees for the picking up, assorting, handling, waybilling, loading, transporting and delivering the maximum of express traffic, while the right is conferred upon others to unjustly and unreasonably deprive it of the use of such facilities, equipment, buildings, cars, roadways, rails, engines, motive power and organization, and to deprive it of its revenues arising from such bussiness, although your Orator must of necessity continue to supply the aforementioned things and service and organization so as to move the normal and usual amount of such traffic.

[fol. 25] C. It also does not conform to the statutory power of said Commission for that your Orator is a carrier by railroad within the meaning of the fourth paragraph of the 15th Section of the Act of Congress known as the Act to Regulate Commerce, as amended, wherein it is provided as follows:

"In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established."

And the Commission has found in the foregoing report that the aforementioned paragraph of Section 15 of the Act as set out, is not applicable to express companies, and having so found, has held that your Orator, as the originating express carrier, is not entitled to the long haul upon traffic originated by it, although it has routes which are reasonable and direct and is rendering service thereover which is reasonable and adequate. The said finding is contrary to said section of said Act.

D. Said order further does not conform to the statutory power of the said Commission for that, if it becomes effective, it will per-

mit shippers to route express shipments without regard to the lawful rights of your Orator.

E. The said order is unjust and unreasonable and therefore be- [fol. 26] yond the statutory power of the Commission for all of the reasons hereinabove set out, and also for the reason that the said order, if it becomes effective will permit the shippers to route shipments so as to cause your Orator, the originating carrier, to be short-hauled on a very large volume of business in the circumstances set out in this bill.

F. For that the principles of Paragraph 4 of Section 15 are applicable to the conditions described in this bill, and if the said order becomes effective, it will direct a course of conduct contrary to the principles of said Section.

G. For that the through routes mentioned in the said order are required to be established by your Orator without first providing for a division of compensation to your Orator, thereby causing an extended, multiplicitous and continuous litigation, and unnecessary conflicts of interest.

23. Your Orator avers that it can have no relief against the matters and things herein set out, and especially against the said order of the said Commission, except through the protection of a court of equity, and if the said order is permitted to go into effect, its property will be taken without due process of law an order of the said Commission which is illegal and invalid and, in contemplation of law, does not exist. And your Orator will be subjected to a multiplicity of actions on account thereof, and will likewise be required to institute many actions at law or suits in equity for the purpose of protecting its rights and its property. And the public will be inconvenienced, the movement of traffic will be disarranged, to the great inconvenience of your Orator and of the public in general.

If your Orator does not comply with the said order, it will be [fol. 27] subjected to suits, and penalties and fines under the terms of the Act of Congress known as the Interstate Commerce Act and the Amendments thereto which will aggregate very great amounts of money; and it will be made subject to many suits in equity and actions at law at the instance of the Government of the interested carriers and shippers; in each of which suits or action separate proof must be made and separate findings will be had.

So that your Orator must either submit to the said order which it believes and alleges to be unjust, unreasonable, and unlawful for each and all of the reasons herein set out, or it must submit to unreasonable suits as above detailed, which must be defended in the circumstances mentioned. Thus your Orator must act in circumstances which do not provide a safe and adequate Judicial review of said order; and in so much as the appeal to the Courts can be had only at the risk of paying penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law, there will be a denial of that due process of law guaranteed to your Orator by the Fifth Amendment to the Constitution of the

United States upon which your Orator relies. Unless the said order of the Commission is suspended and set aside your Orator will suffer irreparable damages for which there is no adequate remedy at law the nature of which damages is hereinbefore specified.

Your Orator can have that Judicial review of said order guaranteed by the Constitution and contemplated by law, in only a Court of Equity, and under its protective process.

24. Your Orator waives discovery under oath of the defendant. [fol. 28] Forasmuch, therefore, as your Orator is without remedy in the premises except in a Court of Equity, and to the end that it may obtain from this Honorable Court the relief to which it is by right and equity entitled, it respectfully prays:

A. That it may please the Court to grant to your Orator a writ or writs of subpœna, to be directed to the defendant, the United States of America, therein and thereby commanding it at a certain time and under a certain penalty therein to be named, to be and appear before this Honorable Court, then and there to answer all and singular the matters herein set out, but not under oath, answer under oath being expressly waived, and to stand to, abide and perform such orders and decrees as this Court may deem meet:

B. And that, in view of the fact that irreparable damage will otherwise ensue to your Orator, unless the said order be temporarily stayed or suspended, an order be entered temporarily staying or suspending the operation of the said order of the Interstate Commerce Commission for not more than sixty (60) days from the date of said order of suspension, pending the application for the order or injunction, and that an order be issued restraining the defendant, its officers, agents and employees from enforcing the aforementioned order of the Interstate Commerce Commission, or any part thereof, and that likewise all persons at interest in said order be restrained from enforcing the same:

C. That an order issue in the terms of the statutes in such cases made and provided, requiring notice and service of this bill and of all orders thereon, as is by such statutes prescribed:

D. That a day be fixed for a hearing of this cause upon application for temporary staying or suspending the said order of the Interstate Commerce Commission, and as well a day be fixed for the [fol. 29] hearing of this cause on interlocutory injunction; and that the said interlocutory injunction issue restraining and enjoining the defendant and all persons at interest, their officers, agents and employees from enforcing the said order of the said Commission herein complained of; and upon final hearing of this cause said defendant and all persons at interest in said order of said Commission, their officers, agents and employees be permanently enjoined from enforcing the same:

E. That the said order be held to be invalid and illegal upon each and all of the grounds herein set out:

F. That your Orator have such other and further relief as may be meet and proper, and that it have general relief.

Alston, Alston, Foster & Moise, Lawton & Cunningham, H. S. Marx, Attorneys for Complainant. Robert C. Alston, T. M. Cunningham, Jr., H. S. Marx, Of Counsel.

[fol. 30] Jurat showing the foregoing was duly sworn to by Wm. G. Smith omitted in printing.

[fol. 31] EXHIBIT NO. 1 TO COMPLAINT

No. 12784.[1]

SOUTHEASTERN EXPRESS COMPANY

v.

AMERICAN RAILWAY EXPRESS COMPANY

Submitted November 29, 1922. Decided March 12, 1923

1. Through routes and joint rates between points on the lines of the Southeastern Express Company and the American Railway Express Company prescribed.

2. Section 15 (4) of the interstate commerce act providing that the commission shall not require any carrier by railroad, without its consent, to embrace in a through route substantially less than the entire length of its railroad, is not applicable to express companies.

3. Shippers' right to designate routing of express traffic, over established routes, recognized and defined.

Sanders McDaniel and Charles J. Rixey for Southeastern Express Company; and Charles E. Cotterell for Southern Fisheries Association.

Robert C. Alston, H. S. Marx, and Blair Foster for American Railway Express Company.

Charles E. Cotterell, N. Buckner, B. E. Harris, C. J. Weber, and A. J. Maxwell for interveners.

Report of the Commission

MEYER, Chairman: Exceptions were filed by defendant to the report proposed by the examiner, and the case was orally argued.

The Southeastern Express Company, hereinafter called the Southeastern, alleges that the failure of the American Railway Express

[1] This report also embraces No. 12786, Southern Fisheries Association v. American Railway Express Company et al.

Company, hereinafter called the American, to establish through routes and joint rates and charges on interstate express traffic, to observe the designation of routing by the shipper, and to establish just, reasonable, and equitable divisions of joint rates, is unduly preferential of the American's routes, unduly and unlawfully discriminatory against and prejudicial to the Southeastern's routes and to shippers desiring to use them, and results in lower rates to and from more [fol. 32] distant exclusive points than those applicable to and from intermediate common points, in violation of sections 1, 2, 3, 4, 6, and 15 of the interstate commerce act. We are asked to prescribe joint through express routes and joint rates, charges, rules, and regulations for the operation of such joint through routes; to require that all available routes be kept open and that the same rate be made applicable between any two points regardless of the route of movement; and to require the American to observe shippers' routing instructions, and permit the use of through express cars over joint routes whenever business makes it necessary. We are also asked to determine and fix just, reasonable, and equitable divisions of the joint rates and charges and order an adjustment to be made in accordance therewith on all shipments which moved under joint rates subsequent to May 23, 1921, the date the complaint was filed. At the hearing it was agreed that the entire question of divisions be reserved for future consideration.

Both express companies are defendants in the complaint of the Southern Fisheries Association. This complaint asks that the express companies be required to establish universal joint through routes, rates, classifications, rules, and regulations. The issues are identical with those presented in the Southeastern case. The complaints were consolidated at the hearing and this complainant was there treated as an intervener in No. 12784.

About 15,000 tons of fish are taken each year from the waters in and adjacent to southeastern territory. The members of the Southern Fisheries Association distribute these fish to various markets throughout the South, East, and West. From 60 to 70 per cent move by express. The Southeastern reduced its local rates on fresh fish and sea foods 10 per cent, and the members of the Southern Fisheries Association, whenever possible, use its services. Expedition is of great importance, and this complainant desires that all routes be open and that the shipper have the right to route.

The Atlanta Freight Bureau; Southern Traffic League; Merchants Association of Concord, N. C.; Asheville, N. C., Chamber of Commerce; Western North Carolina Chamber of Commerce; Mobile Chamber of Commerce; and United States Fisheries Association intervened and introduced evidence. The Macon, Ga., Chamber of Commerce; New Orleans Joint Traffic Bureau; Savannah Traffic Bureau; Jacksonville Chamber of Commerce; Jacksonville Traffic [fol. 33] Bureau; and James E. Grady & Company intervened but presented no evidence.

All the interveners are of the opinion that it will be in the public interest that all direct routes be made available, that the shipper

should have the right to route, and that through competition the public will obtain better express service.

In June, 1918, as a war measure, the existing express companies were consolidated and the American, the defendant herein, was formed. We approved the continuation of this consolidation in Consolidation of Express Cos., 59 I. C. C., 459, decided December 7, 1920. The American was the only express company in operation from July 1, 1918, to May 1, 1921.

The Southeastern was incorporated under the laws of Alabama in October, 1920, and opened its offices for business on May 1, 1921. It was formed principally by men who were either connected with or interested in the Southern Railway system. It operates over the lines of that system, the Mobile & Ohio, the Tennessee Central, the Washington, Baltimore & Annapolis, and the Maryland & Pennsylvania, approximately 9,900 miles of railroad. All of these lines are in the Southeastern States with the exception of the two last named. The Maryland & Pennsylvannia operates between Baltimore, Md., and York, Pa. They serve Washington, Louisville, Cincinnati, Evansville, Cairo, St. Louis, Memphis, New Orleans, and Jacksonville. These points are the principal termini of these roads and hereinafter will be called border points. Practically all other carriers in the United States are utilized by the American. In the Southeastern States it operates over more than 30,000 miles of railroad.

The Southeastern attempted to concur in all the tariffs of the American with respect to rates and charges, rules, and classifications and provide for universal joint rates and routes. The American would not permit this, and by supplements effective May 1, 1921, limited its concurrence, and made applicable joint rates, charges, and routes only from exclusive offices of one company to exclusive offices of the other. Although the Southeastern sought the suspension of the supplement, it was allowed to become effective, and the Southeastern was prevented from participating in joint rates, charges, and routes between common points and exclusive American points, and between common points. On and after May 1, 1921, the American ceased to operate over many routes that it had formerly used, and in [fol. 34] lieu thereof routes its traffic over lines over which it operates. It attempted in all instances to procure either the entire haul or the longest possible haul, and in certain instances traffic was handled over circuitous routes.

Numerous complaints were received by us with respect to express shipments, and as the result of conferences between express officials and our representatives 60 additional joint routes were established, effective August 1, 1921. Certain other joint routes in connection with express handled over the Tennessee Central were established February 9 or March 15, 1922. This became necessary because the American ceased operation over that road on February 1, 1922, and the Southeastern thereafter performed the express service thereon. As a result of these joint routes express now moves between these particular points over the most direct lines.

The record abounds in comparisons of express schedules from which it is argued by each company that the specific route used or

desired to be used is practical and gives either equal or better service than the other route or routes in question. Nothing can be gained by setting forth all these comparisons.

The American contends that if the route used by it is a reasonable one and gives the same service in point of time as the joint route sought by the Southeastern we have no power to require the establishment of such joint route and require the American to short-haul itself, even if the joint route with the Southeastern be also reasonable.

Paragraphs (3) and (4) of section 15 of the interstate commerce act provide:

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated * * *.

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in [fol. 35] conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: * * *.

The phrase in paragraph (3) "applicable to the transportation of passengers and property" includes express traffic. The limitation in paragraph (4) with respect to our power to establish through routes applies to "any carrier by railroad" only. The Southeastern claims that this phrase does not include express companies, and the American contends that it does.

In Wells Fargo & Company v. Taylor, 254 U. S., 175, the United States Supreme Court held that the term "common carrier by railroad" as used in the employer's liability act of April 22, 1908, does not include express companies. The court said:

In our opinion the words "Common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad, * * * and by the fact that similar words in the

original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown.

In discussing this case, the American urges that the question there considered was the application of the Federal employer's liability act, which regulated the liability of railroads for personal injuries; that the present case deals with the express business which is a part of the franchise obligation of a railroad, and an act of Congress conferring administrative powers over express companies or carriers by railroad which has a broader and more general purpose; and that the part of the act under consideration has a purpose broad enough to include property carrier by express.

The express company does not own or operate lines of railroad. In its business the separate lines of each railroad are not observed, but by contract the express company operates as a unit over the lines of the various companies. Section 15 (4) by its terms refers to "carriers by railroad," and does not include express companies. Nor can it be said that the principle there announced should be applied to express companies.

It is our conclusion that the provisions of paragraph (4) of section 15 do not apply to express companies, and it is unnecessary to dis- [fol. 36] cuss cases cited in which the courts and this commission have applied the law in dealing with routes established and connections required to be made between "carriers by railroad."

Aside from the construction placed upon paragraph (4) of section 15, the American claims that under paragraph (4) of section 1, if it provides through routes and reasonable facilities for their operation, it has fulfilled its common-carrier duty to the public, and that we can not require it to establish additional joint through routes which would short-haul it.

Prior to 1910 our authority to establish through routes was limited by the following language:

> Provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

This limitation has now been removed, and we are required to establish through routes whenever deemed by us necessary or desirable in the public interest, and it is for us to determine on the basis of a proper record what express routes are reasonable and in the public interest.

The American claims that even if we have the power to establish joint routes the circumstances here presented do not warrant the exercise of that power.

The American takes the position that the routes which it has used since May 1, 1921, give service which, in point of time, is equal to or better than that given by those formerly used by it and now sought as joint routes by the Southeastern, and that it is unreasonable to require it to open these routes and thus lose its long haul. It shows that the expenditure for property and equipment used by

its operating departments at 35 large cities was $23,739,889.49, and points to the fact that it maintains 28,000 offices throughout the United States. It states, moreover, that its terminal expenses are exceedingly heavy. This expense for the four-month period ending April 30, 1921, in only 12 of the largest cities, aggregated $18,561,821, and the total average number of employees at those places during that period was 27,032. It argues that it is unreasonable to take its business and turn it over to the Southeastern, whose capital stock is only $1,000,000, when it spared no expense to acquire ample facilities and equipment to render the public adequate service.

The American, based upon the traffic which moved during September, 1921, estimated that the annual cost to it would be $201,400 if it were required to turn over traffic, destined to Southeastern ex- [fol. 37] clusive points, to the Southeastern at Cincinnati and Washington gateways instead of at interior points. This does not include all traffic moving via those gateways, or any traffic which moves via the St. Louis, Louisville, Cairo, Evansville, Memphis, New Orleans, and Jacksonville gateways. But upon brief it is stated that all traffic not included in this estimate would result in an additional loss to the American of about $200,000. Prior to the express consolidation, express companies had a mutual understanding that a company with an office at a common point would not receive a shipment destined to an exclusive office of a rival company, when that company also had an office at the common point. The American shows that the departure from this practice, known as the "common to exclusive office rule," based upon 27,712 shipments handled by the Southeastern from common points, destined to American exclusive points, during September, 1921, even after allowing the American its local from the point of transfer to point of destination, amounted to $265,000 per annum. The Southeastern urges that if the American were to compete at common points for traffic destined to Southeastern exclusive points in instances where the American has a reasonably direct joint route, in all probability it would receive an amount of revenue which would offset this alleged loss. In addition to the traffic described, the gross revenue on which totals $666,400, the American asserts that the Southeastern's proposed method of handling other traffic would add materially to the Southeastern's revenue and correspondingly deplete the American's revenue. No estimates were given as to these additional losses, but the American's counsel stated at the hearing that in his opinion the total amount involved was over a million and a half dollars per annum. The American argues that, without special benefit to the public, it is not reasonable to take this revenue from it and the railroads over which it operates and give it to the Southeastern and railroads over which that company operates.

It contends that it is also unreasonable to require the establishment of joint routes between common points and American exclusive points, because then the Southeastern would have a right to violate the "common to exclusive office rule." The testimony shows that on May 1, 1921, the Southeastern observed that rule, but that

thereafter it violated it. For example, a shipment from Atlanta to New York, if delivered to the Southeastern at Atlanta, would be [fol. 38] carried by it to Washington and there turned over to the American. The legal rate was the Washington combination, which was higher than the through rate of the American. The American demanded its local from the junction point to destination, and to obtain the traffic the Southeastern protected the through rate, although there was no tariff authority for such action. The Southeastern subsequently established proportional rates from the principal common points to border points. It is not satisfied with this arrangement and has not established proportional rates on all traffic of this character in which it participates. The American points out that it has never given its consent to this method of handling express, and that in those instances where no proportional rates exist the Southeastern violated the law, as the rates charged were not applicable over the routes of movement. These matters will be inquired into.

The "common to exclusive office rule" is claimed to be equitable because it prevents an express company from being short-hauled, eliminates another company's transfers at junction points, and minimizes the opportunity to route circuitously. The American shows that the Southeastern violates this rule a great many times each day, and that a large number of these shipments are routed circuitously, resulting in delays of from 5 to 48 hours, and sometimes more. Express should be handled over reasonably direct routes. If traffic were delivered to the Southeastern at a common point, and if there were a direct joint route, then it would not be unreasonable for the Southeastern to participate in such traffic. Both companies would be on an equal footing if they competed for traffic destined to the other's exclusive offices. They should be allowed, however, to use only joint routes that are reasonably direct.

The American operates each day to and through southeastern territory over 235 car routes, for which 313 cars are used daily. No car lines operated wholly within this territory or from the border points of Washington, Louisville, Evansville, and Jacksonville to points within the territory are here included. For its use 16 special express trains are operated daily, all of which handle express, destined to southeastern territory, and also 16 special trains in the reverse direction are operated from this territory to American exclusive points.

Evidence was introduced respecting routes and schedules covering practically the entire territory. No attempt will be made to [fol. 39] consider all of these schedules and routes. The examples hereafter shown are typical, and, although all deal with traffic moving through the border point of Washington, they represent the American's manner of handling express through all other border points.

Traffic transported over joint routes from American eastern points to exclusive Southeastern points in North Carolina and South Carolina is transferred to the Southeastern at Raleigh and Charlotte,

N. C., and Spartanburg, S. C. If this traffic were transferred at Washington, it would move over the Southeastern's direct route. The American claims that it is unreasonable in view of its present service to compel it to abandon any traffic to, or to share traffic with, the Southeastern. On the same theory, the Southeastern might decline to join in through routes to or from its exclusive points unless it were given the long haul.

The schedules hereinafter referred to are those in effect at the time of the hearing. Express from New York and other eastern points to Atlanta is handled by the American in through express cars. Express that is picked up in New York on Monday leaves New York at 11 p. m. on the Pennsylvania, and reaches Washington at 5.45 a. m., Tuesday. It leaves Washington at 6.25 a. m. over the Seaboard and reaches Atlanta at 6 a. m., central time, Wednesday. This traffic, prior to May 1, 1921, was handled over the Southern, but did not reach Atlanta until 11 a. m., Wednesday. The Southern's schedule has been changed and its train now reaches Atlanta at 5.25 a. m. The Seaboard also operates a train leaving Washington at 8.55 a. m., arriving at Atlanta at 7 a. m. the next day, and one leaving Washington at 5 p. m., arriving at Atlanta at 3.50 p. m., the next day. All of these trains handle express for intermediate points, and connections are made at Atlanta for Macon, Ga., and Montgomery, Ala.

The Southeastern has equally good schedules from Washington to Atlanta, but, in order to make the platform transfer at Washington, New York traffic should be handled on the Baltimore & Ohio train which leaves New York at 10.40 p. m., and arrives at Washington at 5.10 a. m. Express from New York and other eastern points could also be handled over Southern trains leaving Washington at 9 a. m., arriving at Atlanta at 5.25 a. m. the next day; leaving Washington at 3.30 p. m., arriving at Atlanta at 10.55 a. m.; and leaving Washington at 9.50 p. m., and arriving at Atlanta at 4.50 [fol. 40] p. m. These trains handle express for intermediate main-line points, and points on connecting lines. There are other local Southern trains out of Washington which also carry express to intermediate points.

The American contends that its service to Atlanta can not be improved; that it is unreasonable to require it to transfer Atlanta traffic to the Southeastern at Washington and run the risk not only of delaying the express which it transfers, but all other express which is loaded in the same through express cars. It points out that these cars remain in Washington only 40 minutes. However, if New York-Atlanta traffic were routed via Washington and the Southeastern it could be loaded, as shown above, out of New York on the 10.40 p. m. Baltimore & Ohio train and then through American traffic would run no risk of being delayed. It should be borne in mind that for a great many years prior to May 1, 1921, this movement was via the Pennsylvania to Washington and the Southern beyond. Mails from the east to Atlanta are usually handled over the Southern, but the post-office authorities do not utilize the South-

ern exclusively. They also use the Seaboard when it is in the public interest to do so.

The traffic from New York to Atlanta is somewhat exceptional. From eastern cities, other than New York, Philadelphia, Baltimore, and Boston, through cars are not loaded to the Southeast. From some points through cars are loaded to border points containing traffic for southeastern points.

The Seaboard train leaving Washington at 6.25 a. m. Monday carries a special express car from New York to Raleigh, reaching there at 3.30 p. m. Tuesday. This car contains express destined to North Carolina points located on the Southern and served by the Southeastern, between Raleigh and Greensboro, between Mount Airy and Greensboro, between Danville, Va., and Biltmore, but not including Danville, Salisbury, or Biltmore, and between Salisbury and Norwood. The express which reaches Raleigh at 3.30 p. m. Tuesday gets to Greensboro at 4 a. m. Wednesday. If handled over the Southeastern leaving Washington at 9 a. m., it would reach Greensboro at 5.45 p. m. Tuesday, which would be too late for the Tuesday delivery. Therefore over either route the delivery to consignee would be the same, unless the consignee were to meet the train and thus obtain immediate delivery.

Charlotte business is handled by the American in two cars, one originating at Washington and the other at New York. They are [fol. 41] brought to Monroe, N. C., 20 miles southeast of Charlotte, by the Seaboard, and reach Monroe at 9.45 p. m. Tuesday. The Seaboard train from Wilmington to Charlotte, due at Monroe at 10.45 p. m., takes these cars to Charlotte, arriving there at 11.40 p. m. If this train is missed, a special train carrying both freight and express performs this service. At Charlotte it is necessary to make a cross-town transfer to reach the Southeastern's depot.

The express from the two Charlotte cars is distributed on the main line of the Southern to and including Salisbury; to, but not including, Winston-Salem, N. C.; to and including Taylorsville, N. C.; to, but not including, Spartanburg and Chester, S. C.; from Rock Hill, S. C.; to, but not including, Marion, N. C.; and from Gastonia, N. C.; to and including Edgemont, N. C. None of the main-line points from Salisbury to Biltmore is served through Charlotte.

The Southern train out of Washington reaches Concord, N. C., which is 21.2 miles north of Charlotte, at 8.18 p. m., and Charlotte at 8.55 p. m. Tuesday. Concord express, which has moved by the American, leaves Charlotte at 4.25 a. m. Wednesday, and reaches Concord at 5 a. m., Wednesday. Should this train be missed, express would leave at 10.12 a. m. and arrive at 10.55 a. m. Thus the Charlotte and Concord express, when the schedules are made, have Wednesday morning delivery over either route.

Spartanburg traffic is loaded out of New York on a special express car which is handled over the Pennsylvania and Seaboard special to Greenwood, S. C. It reaches Greenwood at 2.50 a. m. Wednesday. The Piedmont & Northern electric line transports it to Spartanburg via Belton and Greenville, S. C. It is due to arrive at

Spartanburg at 7.30 a. m. Wednesday. This Spartanburg car contains express destined to Asheville, N. C., and to points between Asheville and the North Carolina-Tennessee State line; to points on the Murphy branch of the Southern; to points on the Lake Toxaway branch which runs from Hendersonville to Lake Toxaway, N. C.; and to local points between Spartanburg and Asheville.

A cross-town transfer is necessary at Spartanburg because the Piedmont & Northern and Southern stations are about a quarter of a mile apart. The Southern has three trains from Spartanburg to Asheville, leaving at 8.10 a. m., 10.45 a. m., and 4.50 p. m., which [fol. 42] arrive at Asheville at 11.45 a. m., 2.25 p. m., and 8.39 p. m., respectively. The Piedmont & Northern is frequently late, but when it is not, it is impossible to complete the transfer at Spartanburg in time to reload all express on the train arriving at Asheville at 11.45 a. m. Most of it generally is carried on the train arriving at 2.25 p. m., but at times some of it misses both trains and then arrives at 8.39 p. m.

If this traffic were handled over the Southeastern from Washington it would reach Salisbury Tuesday and arrive at Asheville at 3.30 a. m., Wednesday, and be delivered that morning.

With the exception of perishables, and express consigned to persons located in the vicinity of the depot, the Southeastern fails to deliver the express reaching Asheville at 11.45 a. m., and 2.25 p. m., the day of its arrival. The American asserts that if the Southeastern were not negligent in making delivery this express would reach the consignee only about 5 hours and 20 minutes later than if it were handled through Washington direct over the Southern. The Southeastern explains in detail its Asheville delivery service. It must transfer the express to its uptown office which is a little over a mile from the station and then make delivery from there. The Southeastern has certain natural difficulties to overcome, yet it is subject to criticism for its failure to deliver this express the same day that it arrives. However, the additional time consumed in transit via the Spartanburg route from 3.30 a. m., to 2.25 p. m. shows that that route is too circuitous. The public is entitled to more expeditious service than this route affords. Since the hearing, arrangements have been made to deliver traffic for Asheville to the Southeastern at Washington.

No attempt has been made to give the local schedules from these interior transfer points. The American contends that in the vast majority of cases it makes each schedule, while the Southeastern argues that in most instances the present method of handling results in delaying the express. In many cases a substantial saving of time in actual performance could be accomplished by the use of joint routes through border points or transfer points allowing the American a somewhat shorter haul. Transfers at points requiring crosstown transfer or at interior points where facilities are limited and inferior to those at larger junction points often cause delay and damage.

The Railroad Commission of Georgia issued an order June 24, 1921, requiring that the two express companies establish joint rates. [fol. 43] Its effect was to short-haul the American on intrastate

traffic. This order was reviewed by the United States District Court in American Railway Express Co. v. R. R. Com. of Georgia, 274 Fed., 649, and declared void. The court said:

Again the order, so far as it may require joint rates in instances like the foregoing, would be unreasonable. The power granted to the Commision is to fix "just and reasonable joint rates" and divisions thereof between connecting carriers, and is one to be exercised for the public interest. It never was intended to permit one carrier to short-haul another in the interest of its own business, unless a most decided case of promotion of the public service demanded it.

The American argues that this case is controlling and that we must conclude that it is unreasonable and not in the public interest to require the establishment of the joint through routes in issue.

In that case the order was held void because made without legal notice or hearing as required by law, and the injunction was without prejudice to the right of the railroad commission to proceed from time to time under the statute to fix just and reasonable joint rates. The court was not considering the provisions of the interstate commerce act.

The Southeastern's answer to the American's contention, as to the reasonableness of establishing universal joint through routes and making applicable thereto the same rate between two points regardless of the route used, is based upon its interpretation of the principles laid down in Express Rates, Practices, Accounts, and Revenues, 24 I. C. C., 380, and 28 I. C. C., 131. We said in our first decision in that case:

A survey of the express situation in this country has brought us to the conclusion that there is but one proper view to take of the matter. The act to regulate commerce now imposes upon all of the railroad carriers the obligation to make through routes and to furnish proper facilities for the transportation of freight. This rule applies to parcels as to carloads. The act also by name recognizes the express company as a carrier subject to our jurisdiction. We must therefore regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own. The traffic which they move should flow with the greatest possible celerity between all portions of our country, and whatever artificial barriers have been raised by the existence of separate express companies should be broken down and the rates made or practices followed should neither rest upon the foundation of a railroad's preference nor of an express company's opportunity [page 387].

[fol. 44] * * * A new scheme of rate making must take the place of the present complicated rate structure. A system of through rates must be substituted for the present plan of making rates by way of transfer points, a scheme whereby it will be possible for the agent at the point of origin to obtain the proper through charges by reference to a simple schedule which will give the same rate from

point of origin to destination, no matter by what route the shipment may travel and without reference to the number of carriers that may participate in the haul. As a preliminary to the adoption of such a system, it should be required of the carriers that they jointly establish and publish through rates between all points reached by the lines of the various companies. The performance of this task appears to be made possible only by the adoption of a system of blocks and zones, such as is hereinafter described. * * * With the plan hereinafter suggested there can be only one rate between two points, and thus by the elimination of combinations of locals the opportunity for error is reduced to a minimum [pages 391-2].

Expedition is the very soul of the express business. We find, however, that it has been the custom of the express carriers, when shipments have been intrusted to them for delivery at points not on the lines of railroad over which they operate, to retain possession of the shipment so as to receive the longest possible haul via their own lines. The result has followed that many shipments have been carried by roundabout routes before being delivered to the final carrier [page 392].

For the cure of this most annoying, and one of the most frequent, causes of complaint against the express companies, they should be required forthwith to establish and jointly publish through routes between the principal points in the United States, which routes shall follow the main lines of travel, the most direct in points of time measured by the schedule of those passenger trains by which normal schedules are observed [page 393].

The two classes of service (freight and express) differ in more respects than in mere speed. The express service is essentially more popular—one which touches directly and intimately everyone, and not merely the manufacturer, the merchant, or the farmer. Express shippers are the unorganized mass of the people who have no means of bringing to bear pressure upon the express companies, excepting in the case of the merchant classes who use such service and who have heretofore generally been accommodated with special rates [page 425].

The express carriers must unite in direct through routes, reaching all cities and towns accessible to each other by the shortest route measured in time. The Commission will leave this matter in the hands of the carriers for the present, but will undertake to see that this principle is recognized in the routing of express traffic [page 433].

After the express companies had been heard on the feasibility of allowing the order of June 8, 1912, 24 I. C. C., 380, to become effective, we said in our second decision in the Express case, supra, decided July 24, 1913:

[fol. 45] (4a) The block system of stating rates is admitted by the carriers to be practicable and satisfactory. By its simplicity and intelligibility, it will afford the means for such a statement of express rates as will really publish them to shippers. The order herein will

therefore prescribe such block system of stating rates as the reasonable practice to be followed by the respondent carriers on and after October 15, 1913 [page 137].

As a result of its investigation, the Commission was convinced that if unbearable discrimination and confusion was to be avoided its order must take into account the entire body of rates for express service. In this respect the express service is radically different from the services performed by the railroads in the carriage of passengers and property, and is more precisely comparable with the service performed for the public by the Post Office Department [page 139].

It was the purpose to treat all express companies as a unit forming one national express system, to have express move over direct routes, and to make the same rate applicable thereto regardless of the route over which it moved. It was in the public interest for the express business to receive treatment similar to the mail service. Under the rates, rules, and regulations prescribed in these opinions, the express companies prospered.

Upon the consolidation of the express companies, the same direct lines of traffic were used as when the many companies were in existence. However, when the Southeastern was created the American ceased to use certain direct routes over which it had handled express and substituted therefor other routes. The fact that the discontinued routes were used by the American, when it had access to all routes over all carriers, indicates that they were reasonable routes in and of themselves, although they may not have been the only reasonable routes over which express could have been handled. Because the American has worked out other reasonable routes is not a sufficient reason for permitting reasonable routes, in connection with the Southeastern, to be closed. The fundamental principles laid down in the Express cases were prescribed at a time when there were 11 express companies. They should be followed now. The fact that we expected express companies to establish the most direct routes regardless of their long haul, is shown by the following quotation taken from the first opinion, supra, page 411:

We have said to these carriers in connection with the discussion of the establishment of through routes and rates that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the long-[fol. 46] est haul possible via its own line, and that division shall be agreed upon which shall compensate the originating carrier for its sacrifice.

The testimony shows that the express service at common points has improved since the formation of the Southeastern. This improvement is probably due to competition. There is no competition as to rates because all rates are the same under the block system. The only exception to this is the Southeastern's rates on fish, referred to above, but they are applicable only to Southeastern local

points. When fish originate at or are destined to American points the American rates apply. In considering competition, time is not the only important element. Competition tends to make each company improve its general treatment of the public, its practices, rules, and regulations in regard to its methods of doing business. Taking all of these things into consideration and the fundamental principles laid down in our two decisions in the Express case, we find as a fact that it is in the interest of the public to order established reasonably direct joint express routes.

The quoted extracts from the Express case show the effort to curb circuitous routing by express companies. We first prescribed that direct routes be established. It developed that it would be too much of a burden upon the express companies to file and publish these routes in the technical tariff sense. Thereupon the express companies were relieved from so doing, but it was provided that a direct-routing committee be appointed, including our representative. The duty of this committee was to study the question of routing by express companies, and to provide direct routes in instances where it was found that express companies were indulging in unreasonably circuitous routing. The express companies were expected voluntarily thereafter to use the routes suggested; if not, we, after investigation, were to order what routes should be used. The direct-routing committee made no formal report, but it handled informally from day to day the questions of misrouting. No complaints against the express companies for indirect routing were made subsequent to the decision in 28 I. C. C., 131.

The tariffs showed that all routes were open, but the express companies' practice of using direct routes eliminated and closed just as effectively as if by tariff publication all indirect or circuitous routes. If a shipment accidentally moved by a circuitous route, the rate was the same, but the shipment was improperly handled.

[fol. 47] The Southeastern contends that since no routes were specified in the tariff, all routes were open or "established." The American maintains that the routes decided upon by the express companies which were regularly used by them became "established routes" just as if they had been specifically filed and published in a tariff, and that a route was an "established route" if it was the route used by the particular express company in question.

Notwithstanding the fact that we relieved the express companies from technically establishing direct routes by filing and publishing in the tariff, rule 3 of the express classification found reasonable in the second report, and now in effect, reads "Shippers by designation in writing may route shipments by way of such established routes and transfer points as they may desire." However, the American refuses to obey shipper's routing instructions, and disregards rule 3 of the express classification. For example, a shipment from New York to Asheville, if routed via the Southeastern at Washington, was turned over to the Southeastern, not at Washington, but at Spartanburg. The American says that the Spartanburg route was the one it used, and therefore the only "established route," and that since the shipper had not selected an "established route" the rout-

ing instructions were not binding under rule 3. The Southeastern contends that the American should obey these routing instructions.

The term "established route" must have some meaning. As the American transfers some traffic to the Southeastern at Washington for transportation to certain southeastern points, it can not be heard to say that there are no established routes to such points in connection with the Southeastern at Washington. It appears, therefore, that by providing in its classification for the right of the shipper to route over established routes and declining to observe such designation of routing over established routes, it is acting in disregard of its tariff provisions.

The Southeastern, on the other hand, according to the evidence, wherever it has had the opportunity, has complied strictly with the shipper's routing instructions, even in case where it knew that the shipments were circuitously routed. The use of the circuitous route enabled the Southeastern to obtain its longest possible haul, yet the testimony shows that in those instances the Southeastern's instructions to its employees were to explain to the shipper that the routing was circuitous. Such explanation may restrain the shipper thereafter from complaining but it does not excuse the carrier for in-[fol. 48] dulging in uneconomic transportation.

The American contends that if a strict construction be given to the words "carrier by railroad" in section 15 (4) the phrase "any railroad corporation being a common carrier" in section 15 (8) also should be construed strictly, and that under such construction the shipper would not have the right to route express. The right of the shipper to designate routing was a part of the system of express rates and practices prescribed by use in the cases herein referred to. The express companies themselves provide in their express classification that the shipper has a right to route. Under section 15 (3) we have not only the power to require through routes and joint rates, but also to prescribe the "terms and conditions under which such through routes shall be operated;" and under this power we may provide for the right of the shipper to route. Certainly the establishment of alternative through routes would be of no advantage if the shipper has no right to direct that traffic shall move over such routes.

The Southeastern has 2,651 stockholders, most of them southern business men. The American contends that the unlimited right to route gives these stockholders the opportunity of short-hauling the American in the interest of their own company. The primary object of using express is to obtain despatch and expedition. It became necessary, in the Express case, to forbid an express company from serving unduly its own interests by circuitous routing. There is no more reason for a shipper to be allowed to route circuitously than there is for an express company. In the vast majority of cases, shippers do not route their express. The record shows that because of the various schedules and routes, the average layman is not capable of picking out the most direct route. The president of the Southern Fisheries Association testified that in his opinion about 95 per cent of the men in the fish business could not do it. But this

fact should not prevent a shipper who is capable, and who desires to, from routing express over reasonably direct routes.

The American furthermore contends that a shipper should not be permitted to route traffic over a route that would require it to be short-hauled. It bases this on the necessity of express companies knowing in advance what traffic is to move by each junction point in order that equipment can be furnished and utilized to the fullest extent. The American claims that express would be delivered by [fol. 49] one company to the other company at a junction point at which the receiving company might not have equipment sufficient to handle it. It argues that, if the shipper did not have the right to route, then each company would know in advance the equipment required to be furnished at each point and thus it could render to the public more satisfactory service. This objection could be obviated if the express companies would cooperate. The right of a shipper to route his shipments should not include the right to direct the movement via any and every transfer or connecting point between the two companies, but should include the choice of alternative reasonable direct routes via designated transfer points, one of which is the Southeastern's selected route and the other the American's selected route.

Express shipments from a Southeastern exclusive point to an American exclusive point move over a through route at a joint rate. From an intermediate common point, a shipment over the same route is assessed the combination rate, which is higher. The Southeastern contends that this is a departure from the provisions of the fourth section. This situation has been cured in part by the proportional rates published by the Southeastern from common points to border transfer points. The American contends that the shipment from the common point can be satisfactorily carried by its single-line route at a rate not in excess of that from the exclusive point beyond; and that as no through routes have been established, shipments may not properly move from common points over the lines of the two companies.

Undue prejudice is said to result from the fact that between exclusive Southeastern points and exclusive American points through routes and joint rates apply, while between near-by common points and American exclusive points a shipper has access only to the American route in the absence of proportional rates; and from the fact that some common points are accorded joint routes to and from American exclusive offices and other common points are not.

We are of the opinion and find that it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Company and points on the lines of the Southeastern Express Company, regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct joint route via another junction which [fol. 50] allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel;

that joint through routes shall be established, in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Company and the other via the transfer point selected by the American Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings.

The American should cancel its restrictive schedules and the express companies should recognize as "established routes" the reasonable direct routes which they shall establish in accordance with our findings. Each express company, when traffic received by it is unrouted, should have the right to use the reasonable route which will give it the longest haul, but, if the express is routed via "established routes" the routing instructions should be obeyed. The best way to provide for the establishment of routes may be for each company to have individual routing guides showing its selected routes. The shipper should then be allowed to route over any route contained in either guide.

It should not be difficult for the express companies to decide between themselves as to what routes are or are not reasonable. They could be aided by an arbitration committee with duties similar to those of the former direct-routing committee. We can not pass upon the reasonableness of all routes at this time. Express schedules are constantly changing. The express companies will be given an opportunity to comply with our findings herein. If it later becomes necessary we will pass upon those specific routes upon which the express companies fail to reach a satisfactory agreement.

By the commission.

George B. McGinty, Secretary.

[fol. 51] EXHIBIT No. 2 TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 12784

SOUTHEASTERN EXPRESS CO.

vs.

AMERICAN RAILWAY EXPRESS CO.

To the Honorable the Interstate Commerce Commission:

The Southeastern Express Company and the American Railway Express Company beg leave to report to the Commission as follows:

1. In pursuance of the suggestions contained in the report of the Commission in the above stated case, which was made public on the 7th day of April, 1923, a Committee from each Company met

in the City of Washington on the 3rd day of May "to decide between themselves as to what routes are or are not reasonable".

The Chairman of the Committee appointed by the Southeastern Company was its General Manager, J. E. Skaggs; the Chairman of the Committee on behalf of the American Company was its Vice-President, William G. Smith. The conference had the benefit of the presence of Messrs. Keane and Knowlton, on behalf of the Commission, throughout all of its sessions.

2. The Committee on behalf of the Southeastern Company stated that it had made considerable progress in compiling two routing guides or directories, one of which dealt with routings to and from points beyond the points which are called, in the foregoing report, "border points". This was described as its interterritorial routing guide. The other dealt with routings from point to point within the territory in which both Companies operate. This it called its intraterritorial routing guide.

The American Company was invited to send representatives to the offices of the Southeastern to examine the work which had been done on these two guides.

The American Company did send representatives to the offices of the Southeastern for the purposes mentioned. Thereupon the first [fol. 52] session of the two Committees recessed until the afternoon of the 4th day of May.

3. The two Committees reconvened in pursuance to the recess. Mr. George S. Lee, Traffic Manager of the American Company, who acted as Chairman of the Sub-Committee from the latter Company in the examination of the aforementioned routing guides of the Southeastern made report.

He stated that the proposed interterritorial guide did not, in the opinion of the American Company's Sub-Committee of which he was Chairman, provide adequate transfer points, and that the routings under it would not be direct, and its adoption would result in establishing unreasonable routes and would be very cumbersome and voluminous.

His chief specific criticism (by way of illustration) of such interterritorial routing guide was that Memphis had been selected by the Southeastern as its transfer point for traffic moving from certain sections of the West (instancing the States of Arizona and Arkansas) and that by reason of the necessity for splitting the traffic originating at and destined to points in these States, in order that the same might move conveniently and expeditiously over different systems of railroad, New Orleans and Meridian should be designated as transfer points for some of the traffic according to points in the section of the two respective states where it might originate or to which it might be destined.

The Chairman of the Southeastern Express Company's committee stated that he would be glad to designate transfer points other than Memphis in every instance where it could be shown that such other transfer points would facilitate the expeditious handling of traffic.

The Chairman of the Southeastern's Committee also stated gener-

ally that he would make changes and exceptions in the routing guides wherever the American Company convinced him that such changes and exceptions would be of benefit and conduce to direct routing and expeditious handling.

Mr. Lee further stated that the proposed intraterritorial guide was being made up upon the basis of establishing routes from all the points in one State, say Florida, to all other points in each of the other States in the territory where both Companies operate, separated as to States. That is, there would be a separate guide from all points [fol. 53] in Florida to all points in Georgia, and another from the same points to all points in Alabama, etc. Each of these guides would be bound together in such form as might be determined—loose leaf or otherwise. The total number of pages necessary to set out the intraterritorial guides was estimated by the Chairman of the Southeastern Committee at five hundred (500), provided that a type somewhat smaller than that usually used in printing interstate schedules was used. Mr. Lee thought that the number would be larger.

Mr. Lee also stated that if the same plan were followed by the American the result would be another set of interterritorial and intraterritorial guides; the intraterritorial guides would not be smaller, and the interterritorial guides would be much larger in size and contents. That the labor and the cost incident to the preparation and maintenance of such guides would be very great, and that this plan should be adopted as a last resort only.

At this time the American Company's Committee called attention to the fact that the Southeastern had held up payment of its traffic balances for January, 1923, and had indicated that it would offset these balances month by month until a claim made by it against the American for approximately Two Hundred Twenty-one Thousand ($221,000) Dollars had been absorbed.

The Southeastern stated that its claim against the American Company was based upon the contention made by it in its complaint in this case, in substance to the effect that the American Company had in its special supplement to its tariffs, effective May 1, 1921, illegally restricted the application of through rates, having confined the application of the same to the exclusive offices of the two Companies (with the exception of certain routes which were put into effect by agreement between the two Companies), and that in instances where the American Company had exacted its local charges in the handling of joint business reparation should be ordered by the Commission and repayment should be made to the Southeastern, to the end that the American Company, instead of being allowed its locals in such instances, should be required to recast the division upon the basis of a rate prorate and make retroactive settlement with the Southeastern from the date of the filing of the complaint for the differences in money which would result from the changed basis of division.

[fol. 54] The American Company called attention to the fact that much of this traffic moves under the proportional tariffs filed by the Southeastern, Rule 3 of which is as follows:

"First ascertain the block number of the originating or destination station of the express company from or to which the shipment is transferred. Then, from the charges applicable to the shipment under the rate scale number shown opposite that block in Section 1 of this tariff, deduct the charges applicable to such shipment under the rate scale number shown opposite the same block number in the table of Section 2 of this tariff provided for the transfer point at which the shipment is transferred from or to such other express company. The result obtained is the proportional rate or charge of the Southeastern Express Company between its stations named on title page hereof and such transfer point."

and that certain other of the traffic moved without any rate schedules having been filed by the Southeastern therefor.

4. The Conference recessed until the Southeastern might further consider this question. On the reconvening of the Conference on the morning of May 5th, the Southeastern proposed a modus vivendi as to the matter of settlement of the traffic balances; which, with some suggestions made by the American, is as follows:

"I am authorized by the President of the Southeastern Express Company to state that that company will continue to make tentative settlements with the American Railway Express Company as to moneys derived from joint traffic as it has since May 1st, 1921, and will continue to do so until the question of division is either agreed upon by the two companies or is settled by a decision of the Interstate Commerce Commission, expressly reserving, however, the insistence upon its right, asserted in its original complaint in Docket No. 12784, to have readjustment and repayment made during the period subsequent to the filing of its original complaint, and until the basis for divisions shall have been finally determined, using for such readjustment the basis of divisions finally determined, so as to make the same retroactive to the date of the filing of the original complaint.

In acting upon the above neither company waives any right which it claims or may claim, and action thereon will not have the effect of diminishing any claim of right of either company as to past or future transactions, nor shall such action be construed as making precedents in any such settlements as to past or future transactions." This was accepted by both Companies.

[fol. 55] 5. The American then submitted in writing its plan for dealing with the major subject of the Conference. It is as follows:

"The American Railway Express Company desires to compose the differences existing between it and the Southeastern Express Company even at material sacrifice. To this end it makes the following propositions:

The restrictive tariffs which were filed by the American Railway Express Company effective on May 1, 1921, were made necessary because the Southeastern departed from the plan provided by the Commission for the enforcement of the decisions in the express cases re-

ported in the 24 and 28 I. C. C. reports, in that it made no provision against unreasonable circuity of routing of express traffic, which the Commission had condemned.

In the light of the Southeastern's attitude the American Company's restrictive schedules were, and are now, the only check on circuitous routing of express traffic.

The American has established a large number of through joint routes with the Southeastern Express Company. It believes that the routes which have been established now give to the public not only a reasonable express service, but, in many respects, the best express service the public has ever known in the territory involved. It is, however, willing to establish additional joint routes, if any are necessary in order to obviate unreasonable delay in the delivery to consignees.

The study which it has given to the situation and the work which it and the Southeastern Express Company have done in the matter of establishing routing guides, show that these guides can be established and maintained only at great labor and cost and without commensurate advantage to the shipping public; and, that, if it is practicable, another and different plan should be adopted for the handling of express business.

To that end the American Company is willing to concede the elimination of the "common point to exclusive rule," and cancel its restrictive schedules, provided that the shippers' rights to route shall be limited to such established routes.

In the establishment of any such joint routes the originating carrier shall have the right to the long haul so far as that can be preserved to it without causing unreasonable delay in the delivery of the traffic to the consignee. The shipper shall have the right to designate in writing upon the shipment which of the established joint routes shall be used.

The two companies should in good faith agree that there shall be no unreasonable circuity of routing and each company should appoint one or more representatives as a joint committee to constantly supervise the matter of routing to the end that such circuitous routing shall not be practiced either by the carriers or the shippers.

[fol. 56] Said Committee shall make report to the Commission at such times and from time to time and in such form as the Commission may direct.

Concurrently with the action herein outlined becoming effective the American Company will cancel its restrictive tariffs."

The Southeastern, when the foregoing proposition was presented, stated that it could not see its way clear to accept the proposition but desired to give it mature consideration before it made final answer to the American Company.

6. Thereupon the Conference recessed until 1:30 p. m.

Upon reconvening of the Conference the Southeastern announced that it took issue with the recitations contained in the American's proposal and that it could not accept the plan itself, which it regarded as being out of accord with the Commission's report.

The Southeastern stated, in connection with such proposition, that while no order had as yet been made by the Commission, at the same time that body had made express findings and that the proposition of the American Company, in the opinion of the Southeastern in certain respects, contravened the very terms themselves of the Commission's findings and that, according to its conception, neither Company, nor the two in conjunction with each other, had the right to make an agreement which was at variance with and contrary to the decision and findings of the Commission, on account of the interest of the public in the decision and the matters dealt with therein.

The Southeastern further stated that it did not believe that the proposition of the American Company would give efficacy to shippers routing over all reasonable direct routes, which routing privilege on the part of the shippers it contends the report of the Commission had definitely recognized.

The Southeastern also stated, in connection with the American's proposition, that if the same was its ultimatum it proposed to go forward with the preparation and compilation of its routing guides, and in doing so, it was willing to receive suggestions and criticisms from the American Company if it saw fit to make them, and that it was the intention of the Southeastern to submit to the American Company the result of its work as it progressed; that as reasonable direct routes were from time to time compiled by it, the Southeastern would submit such routes to the Commission requesting [fol. 57] the approval of the same and orders from the Commission putting such routes into effect and requiring them to be observed by both Companies.

The American Company stated that it desired to avoid reaching the point of an ultimatum. It thought that the two Committees should make a joint report to the Commission in the hope that the wisdom of the Commission might enable the two Companies to overcome the impasse which they had apparently reached.

7. Discussion of a general nature then ensued as to the report which the two committees would make to the Commission. Certain representatives of the American Company suggested that it might be necessary to clarify or modify the Commission's report, indicating that it was the opinion of the American Company that this should be done.

The Southeastern stated that whatever might be the views of the American Company it was the opinion of that Company that the report of the Commission needed no clarification.

It was then agreed that report should be made by the two Companies that they had been unable to agree, and that the Conference would recess and the two Companies would jointly make representation to the Commission of the status of the negotiations, with the right in either Company to make such motion or motions as it might desire looking to either an interpretation or modification of the Commission's report as it might deem proper.

In the meantime the Southeastern Company should be under no obligation to delay its work on its proposed routing guides.

8. The two Companies, in compliance with the above mentioned agreement, do now make this report to the Commission, requesting from it such suggestion in the premises as it may deem wise.

Respectfully submitted, Wm. G. Smith, Chairman of Committee on Behalf of American Railway Express Co. J. E. Skaggs, Chairman of Committee on Behalf of Southeastern Express Co.

[fol. 58] EXHIBIT NO. 3 TO COMPLAINT

8641

INTERSTATE COMMERCE COMMISSION

No 12784[1]

SOUTHEASTERN EXPRESS COMPANY

v.

AMERICAN RAILWAY EXPRESS COMPANY

Decided July 9, 1923

Specific through routes and joint rates between points on the lines of the Southeastern Express Company and points on the lines of the American Railway Express Company prescribed. Former report 78 I. C. C., 126.

Sanders McDaniel and Charles J. Rixey for Southeastern Express Company, and Charles E. Cotterell for Southern Fisheries Association.

Robert C. Alston, H. S. Marx, and Blair Foster for American Railway Express Company.

Charles E. Cotterell, N. Buckner, B. E. Harris, C. J. Weber, and A. J. Maxwell for interveners.

Supplemental Report of the Commission

MEYER, Chairman: In our report in this proceeding, 78 I. C. C., 126, decided March 12, 1923, we found:

That it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates should be maintained between points on the lines of the American Railway Express Company and points on the line of the Southeastern Express Company regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct

---

[1] This report also embraces No. 12786, Southern Fisheries Association v. American Railway Express Company et al.

joint rate via another junction which allows it a longer haul; that the rates between any two points should be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes should be established, in instances where they will result in reasonable direct routes, so that there would be at least two reasonable direct routes, between such points, one of which should be via the transfer point selected by the Southeastern Express Company and the other via the transfer point selected by the American Railway Express Company; and that the tariff should provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings.

No order was entered, but the express companies were expected to agree upon reasonable routes, and if necessary we were to pass upon [fol. 59] the specific routes upon which they might fail to reach a satisfactory agreement.

A committee representing each company held conferences for the purpose of reaching agreements which would give effect to our report. It apparently demonstrated the inability of the express companies to agree, and the additional express routes have not been provided.

The American thereupon filed a petition for reargument and modification of the report, and filed, to become effective July 14, 1923, a tariff which cancels its restrictive schedules, so that the same rate would be in effect—

From all offices of Express Companies party to this tariff, to all offices of Express Companies party to this tariff, whether carried wholly by one Company or by two or more Companies, provided that the originating Company shall have the right to the long haul so far as that can be preserved to it without causing unreasonable delay in the delivery of the traffic to the consignee.

This tariff was proposed pending our action on the petition for reargument and the final disposition of the case. The Southeastern has protested against these schedules becoming effective.

Rule 3 of the express classification provides:

Routing Shipments: Shippers, by designation in writing, may route shipments by way of such established routes and transfer points as they may desire.

From exclusive points on the line of one company to exclusive points on the line of the other company there are no restrictions in the tariffs as now published, and the rates are the same regardless of the route over which the traffic moves; but under the construction placed by the American upon the provisions of the tariffs with respect to the right of the shipper to designate routing, it declines to observe such routing and transports the traffic over routes customarily used by it.

The proposed tariff would in effect nullify the provisions of rule 3 of the classification and would not be a compliance with our findings. Except with respect to shipments from common points to exclusive points, it would apparently not provide competitive routes over which the traffic could move, nor give to the shipper the right to route, except by the selection of the carrier to which he would give traffic at points of origin common to both companies.

[fol. 60] The tariff has been suspended and the petition for reargument denied.

In our report, page 143, we state that—

> The best way to provide for the establishment of routes may be for each company to have individual routing guides showing its selected routes. The shipper should then be allowed to route over any route contained in either guide.

This suggestion was not intended to be a definite requirement to be used to the exclusion of any other method which might be devised which would be more expedient and less burdensome upon the express companies. Our only purpose was to secure to the shipper the right to route his shipments and at the same time to prevent him from abusing that right by circuitous routing. If a better method than the routing guide can be suggested by the express companies, no objection will be made by us to its being employed.

The Southeastern has filed a supplemental petition, setting out in an appendix a proposed routing guide for application between points in southeastern territory and points in other territories, and asked that an order be entered requiring the establishment of such routes. Although the record in this proceeding is exceedingly voluminous, it does not contain evidence respecting the reasonableness of all of the routes contained in the guide. An informal examination of the proposed guide indicates that some of the routes shown therein would not be such reasonable routes as we would require to be established.

It is particularly contended by the American that it is unreasonable to establish joint routes from exclusive points on its line to points common to both companies, where it may transport the traffic over its own route from points of origin to final destination, and compel it to turn the traffic over to its competitor at an intermediate junction point, unless there would result a substantial saving in time of delivery to the consignee. One such instance is traffic from New York, N. Y., to Atlanta, Ga., in which the schedule via the route of the American is but approximately 30 minutes in excess of the schedule via the joint route in connection with the Southeastern via Washington, D. C. Over the route of the Southeastern via Washington, traffic would reach Birmingham, Ala., at 12.10 p. m., and over the American's single-line route would arrive at 1.40 p. m. the same day.

[fol. 61] The Southeastern contends that the American is not making the schedules claimed; that under the best possible showing the transfer to the Southeastern at Washington would give equal or bet-

ter results; and that the movement on through main-line trains over the Southern Railway would obviate the risk of delay and danger of missing connections.

We can require a carrier to perform only a reasonable act. The question of divisions over joint routes still remains for determination. The reasons set forth in the original report, including testimony of record that at competitive points the express service has improved because of competition, demonstrates that the additional joint routes from American exclusive points to common points are reasonable and in the public interest.

It was our expectation that the principles laid down by us in our report would be complied with without the necessity of entering an order. It is now apparent that an order is necessary.

We shall at this time by order prescribe certain through routes and joint rates with respect to which the record warrants the finding that they are reasonable and will require their establishment, reserving for further consideration either upon the present record or upon further hearing the establishment of additional routes.

We are of the opinion and find that it is necessary and desirable in the public interest that through routes and joint rates applicable thereto be established between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, and New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Company from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Company and the Southeastern Express Company at Washington, D. C.

We further find that the rates contemporaneously applicable between the above-named points over routes now used are and for the future will be just and reasonable rates for application over the routes herein prescribed.

We further find that the tariffs should provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed.

All findings herein are without prejudice to issues presented in Docket No. 13930, Express Rates, 1922, now pending before us.

An appropriate order will be entered.

Commissioner Hall dissents.

[fol. 62] EXHIBIT No. 4 TO COMPLAINT

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 9TH DAY OF JULY, A. D. 1923

No. 12784

SOUTHEASTERN EXPRESS COMPANY

v.

AMERICAN RAILWAY EXPRESS COMPANY

No. 12786.

SOUTHERN FISHERIES ASSOCIATION

v.

AMERICAN RAILWAY EXPRESS COMPANY and SOUTHEASTERN EXPRESS COMPANY

Order

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, under date of March 12, 1923, having made a report (78 I. C. C., 126), and on the date hereof, having made and filed a supplemental report, said reports containing its findings of fact and conclusion thereon, which said reports are hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to establish, on or before October 20, 1923, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Company, from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Company and the Southeastern Express Company at Washington, D. C.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before October 20, 1923, upon like notice to this commission and to the general public, and thereafter to maintain and apply to the transportation of shipments of express, rates between the points designated in the preceding

paragraph which shall not exceed the rates contemporaneously in effect between said points over the routes now used, and that the tariffs shall provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 63] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

ORDER FOR TEMPORARY STAY—Filed Aug. 15, 1923

The American Railway Express Company, Complainant in the above stated cause, has presented its bill, duly verified, seeking to have the order of the Interstate Commerce Commission dated the 9th day of July, 1923, issued in the consolidated case of Southeastern Express Company vs. American Railway Express Company and Southern Fisheries Association vs. American Railway Express Company and Southeastern Express Company, declared to be illegal and void and to have the same suspended and set aside.

The said bill prays for an order temporarily staying or suspending said order of the Commission and as well for an interlocutory injunction and for permanent injunction.

Said bill having been read and considered, it is ordered that the same be filed in the office of the Clerk of this Court.

It is further ordered that the said bill be, and the same is, hereby set for hearing, upon its prayer for an order temporarily staying or suspending said order of the Commission, and as well upon its prayers for an interlocutory injunction, in the United States District Court [fol. 64] Room, at Atlanta, Georgia, at Ten o'clock A. M. on the 12 day of Sep't 1923, before a Court to be composed of three judges, as is contemplated by the Acts of Congress in such cases made and provided.

It is further ordered that a copy of said bill and of this order be served upon the Interstate Commerce Commission and the Attorney General of the United States, at least five (5) days befor- the date hearin fixed for such hearing and that this shall be service upon the Defendant, the United States of America, and such service shall be the notice of such hearing for an order temporafily staying or suspending said order of the Commission, and as well of the hearing for interlocutory injunction, required by the statutes in such cases made and provided.

It is further ordered that any person at interest may intervene in

this cause, as is contemplated in the Acts of Congress in such cases made and provided.

The undersigned will immediately call two other judges, at least one of whom shall be a circuit judge, to his assistance to hear and determine the said application for a restraining order and application for an interlocutory injunction.

August 14, 1923.

Sam'l H. Sibley, U. S. Judge.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

ACKNOWLEDGMENT OF SERVICE AND NOTICE OF BILL OF COMPLAINT AND OF HEARINGS TO BE HAD ON BEHALF OF THE UNITED STATES AND ON BEHALF OF THE ATTORNEY GENERAL OF THE UNITED STATES—Filed Aug. 23, 1923

Service of the Bill in the above mentioned cause and the order of Hon. Samuel H. Sibley, Judge of the United States District Court for the Northern District of Georgia entered thereon, dated the 14th day of August, 1923, and receipt of a copy of said bill and of said order are acknowledged on behalf of the United States and on behalf of the Attorney General of the United States.

Notice is accepted that the said bill is set for hearing upon its prayer for an order temporarily staying or suspending the order of the Commission, dated the 9th day of July, 1923, which said order is described in the said bill, and as well upon its prayer for an interlocutory injunction. Subpœna and service of subpœna and further service of said bill and order are waived by the United States and by the Attorney General of the United States.

Dated at Washington, D. C. this 17th day of August, 1923.

Herman J. Galloway, Special Assistant to the Attorney General.

[File endorsement omitted.]

[fol. 66] IN UNITED STATES DISTRICT COURT

ACKNOWLEDGMENT OF SERVICE AND NOTICE OF BILL OF COMPLAINT AND OF HEARINGS TO BE HAD BY INTERSTATE COMMERCE COMMISSION—Filed Aug. 23, 1923

Service of the bill in the above mentioned cause and of the order of Hon. Samuel H. Sibley, Judge of the United States District Court for the Northern District of Georgia entered thereon, dated the 14th

day of August, 1923, and receipt of a copy of said bill and of said order are acknowledged on behalf of the Interstate Commerce Commission.

Notice is accepted that the said bill is set for hearing upon its prayer for an order temporarily staying or suspending the order of the Commission, dated the 9th day of July, 1923, which said order is described in the said bill, and as well upon its prayer for an interlocutory injunction. Subpœna and service of subpœna and further service of said bill and order are waived.

Dated at Washington D. C., this 17th day of August, 1923.

Interstate Commerce Commission, by E. M. Reidy, Attorney.

[File endorsement omitted.]

[fol. 67] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

PETITION OF SEABOARD AIR LINE RAILWAY COMPANY FOR INTERVENTION

To the Honorable the Judges of said Court:

Come now Seaboard Air Line Railway Company, a body corporate under the laws of the States of Virginia, North Carolina, South Carolina, and other States, and brings this, its petition for intervention, and respectfully shows to the Court, as follows:

1. Your petitioner, sometimes hereinafter called "the intervenor," is a common carrier by railroad and, as such, is engaged in the transportation of persons and freight in interstate, intra-state and foreign commerce. It has extensive lines of railroad, among others a line of railroad from Birmingham, in the State of Alabama, to Atlanta, in the State of Georgia, and from Atlanta to Richmond, Virginia, its said line of railroad from Atlanta to Richmond running through Athens, Georgia, Greenwood, South Carolina, Hamlet, North Carolina, and thence to Richmond. From Richmond, Virginia, it has traffic arrangements with the Richmond, Fredericksburg and Potomac Railroad, which, although a separate corporation, is owned, in part, by intervenor. Under and by virtue of said traffic arrangement with the Richmond, Fredericksburg & Potomac Rail-
[fol. 68] road, the trains of intervenor, both freight and passenger, are operated into the City of Washington, in the District of Columbia. Under and by virtue of traffic arrangements heretofore made and now existing between intervenor and the Pennsylvania System, your petitioner is enabled to maintain service for both freight and passen-

gers from Birmingham, Alabama, through Atlanta, Georgia, and thence to Washington, and on into the City of New York, said freight and passenger service embracing all intermediate points and reaching other points on connecting lines.

2. Intervenor does not, in its capacity as a common carrier by railroad, maintain directly a transportation service of the kind which is commonly termed an "express service." The transportation of express and express matter is, however, an important part of intervenor's railroad business, and is a necessary service for the communities, industries and persons which intervenor serves.

3. The territory hereinbefore generally described, served by intervenor, contains important industries, populous communities, and large agricultural interests. The express and express matter which is transported over intervenor's said line of railway is large in volume and important to intervenor.

4. As above set out, intervenor does not maintain directly an express service, but, recognizing the importance and necessity of such service, it has heretofore entered into a contract covering the same with the American Railway Express Company, the complainant in this cause. Said contract is now in existsnce and of full force and effect and the same is upon a form known as "Amended uniform contract for express operations over rail lines." Under and by virture of said contract, the said Express Company is conducting upon and over the railway lines of intervenor an express transportation [fol. 69] business, to-wit: Such express transportation business as was commonly carried on by Express Companies as of December 27, 1917. Said express transportation business is carried on by the complainant as a common carrier by railroad under and pursuant to the contract aforesaid. In said contract intervenor did let and demise to the Express Company the exclusive right and privilege, so far as intervenor had the legal right to let such exclusive right and privilege to any one, to control, conduct, and transact all the express transportation business over the lines and upon such passenger, express or mail trains of intervenor as might be agreed to, upon the main lines, branches and extensions of all railroads then or thereafter, during the continuance of said contract, owned or leased and operated by intervenor. A copy of said contract is hereto attached, marked "Exhibit "A," and made a part of this petition as fully as if the same were copied herein, and intervenor prays reference to the same when and as often as may be necessary.

For the reasons above set out, intervenor avers that it has a direct interest in this litigation and shows to the Court that any decree entered herein will affect intervenor and its rights under the contract aforesaid. Under the contract aforesaid, intervenor has the right to receive, and does receive, a division of the proceeds arising from the transportation of such property as is transported by express over its lines of railroad, to-wit: Upon carload shipments consigned from one consignor to one consignee, at one destination, moving under carload rates which exclude vehicle service, the Express Company pays

to intervenor eighty-five per centum of the gross revenue accruing on its lines from the rail haul (not including in the gross revenue from the rail haul any charges separately ascertainable for refrigeration, partial loading or unloading in transit and other accessorial services). On less than carload shipments intervenor receives a percentage of that portion of the income arising from said business, termed in the contract aforesaid "Income for Division." Said con- [fol. 70] tract provides, among other things, that after deducting from the gross income accruing from the express transportation of less than carload lots certain specified items, the balance remaining shall be designated as "Income for Division" and from it shall first be set aside for the Express Company an amount equaling two and one-half per centum thereof. The remaining balance, designated "Net Income for Division," is distributed among the railroads in the group executing said form of contract, including intervenor, in the proportion that the gross express transportation revenues on other than carload lots for the month earned on the line of each such railroad bears to the gross express transportation revenues on other than carload business earned on the lines of all such railroads in that group for that month.

6. Intervenor avers that it is unnecessary, in the statement of its case, to set out with more particularity the basis upon which revenues accrue to it under said contract, but here states its willingness to make such other and further proof thereof as the Court may require. Under the contract existing between intervenor and the complainant, the gross operating revenue accruing from said express business which would be affected by said order amounts, approximately, to the sum of $1,000,000 per annum or more.

7. As more particularly set out in the original bill filed herein by the complainant, and in the exhibits attached thereto, the cars in which express is transported by the complainant over the lines of intervenor are supplied by intervenor. Intervenor also supplies the roadbed and rails and all other railroad equipment, including the motive power and rolling stock, together with the crews necessary to operate the trains upon which express is transported. The complainant, as a common carrier by railroad, utilizes in its transportation business the equipment, supplies, and men so furnished by intervenor. Intervenor, therefore, avers that, under the contract afore- [fol. 71] said, and under the law, it is carrying on its express transportation through the medium of the American Railway Express Company, the complainant herein, and that intervenor is, as a common carrier by railroad, so carrying on its express transportation, entitled to the benefits and protection of those Acts of Congress in such cases made and provided, and is entitled to the benefit and protection of the Constitution of the United States.

Intervenor shows that it is particularly entitled to the benefit and protection of the Fifth Amendment to the Constitution of the United States, and of the protective provisions contained and set out in the Fourth Paragraph of the Fifteenth Section of that certain Act of

Congress, known as the Act to Regulate Commerce, which provisions read as follows:

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established."

Said statutes and said constitutional provisions are invoked by the complainant in said cause, and intervenor here and now invokes the same for its own protection, upon the same grounds and for the same reasons as are set forth in the original bill as filed herein.

8. Intervenor shows that, in anticipation of enjoying the fruits of the said contract, and as a matter of necessity in order to take care [fol. 72] of the express business arising thereunder, it has been forced to lease from the Arms-Yager Railway Car Company fifty express cars, at a cost of $6.50 per car per day, or $118,625.00 per year. It was necessary to equip said cars with steam heat fixtures and lights, at a cost of $18,209.28, 50% of which cost of equipment was paid by intervenor, the other half having been paid by the said Arms-Yager Railway Car Company. On December 15, 1922, intervenor found it necessary to lease twenty additional cars from the said Arms-Yager Railway Car Company, at an expense of $47,450.00 per year. The per diem cost of the cars now in service, the acquisition whereof was found to be necessary on account of the business arising under the contract aforesaid, amounts to $166,330.00 per year. Said cars are leased in periods of six months, but intervenor has already agreed to lease the said cars for additional periods which will not expire until April 30, 1924, and June 15, 1924, respectively.

9. One through express train, carrying nothing but express, is operated daily out of Atlanta, and one into Atlanta, loaded with express destined for the termini of intervenor's lines, and to points intermediate and beyond.

10. Intervenor shows to the Court that the effect of the order of the Interstate Commerce Commission in the original bill complained of would be to deprive intervenor of the haul over its own through routes of such express originating in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York, *New York*, and upon all points on the direct routes of the American Railway Express Company between New York and Washington, D. C. as might be directed to be diverted therefrom at Washington, the transfer point between the American Railway Express Company and the Southeastern Express Company, designated in

[fol. 73] said order. Such would necessarily be the effect of said order, although intervenor has, through its connection with the American Railway Express Company, prompt, satisfactory and ample through routes between the points above indicated to Atlanta, Birmingham and all intermediate points, as well as other points reached by connecting lines. The requirement to transfer said express at Washington, and the consequent diversion of the same from intervenor's lines of railroad, would result in depriving intervenor of considerable revenues, the exact amount whereof cannot be stated, and would entail irreparable loss and damage to intervenor, in violation of its rights under the law and statutes of the United States and under the Constitution thereof. This result would follow although intervenor has acquired the equipment, established the routes, has entered into the contract aforesaid, and is maintaining over its own and connecting lines a service which the Honorable Interstate Commerce Commission, as is more fully set out in the original bill of complaint, found to be satisfactory and ample.

11. Intervenor alleges that the said order of the Interstate Commerce Commission is void and of no effect, and is illegal and unconstitutional, for all of the reasons set out in said original bill of complaint. Intervenor adopts the allegations of said original bill of complaint and joins in all of the prayers for relief, general and special.

Wherefore, intervenor brings this, its petition for intervention, and prays that it may be made a party plaintiff herein by appropriate order of this Honorable Court, to the end that it may be able to secure the protection and benefit of any decree which this Honorable Court may enter in this case, and intervenor prays, without repeating the same, for the same and identical kind and character of relief, general and special, as prayed in said original bill of complaint, and that it may be in all respects protected by any order of injunc-[fol. 74] tion, interlocutory or permanent, which may be entered in this cause.

Randolph & Parker, Intervenor's Attorneys.

Jurat showing the foregoing was duly sworn to by S. P. Stringfellow omitted in printing.

[fol. 75] In United States District Court

Order Allowing Intervention—Filed September 12, 1923

The above and foregoing matter coming on to be heard upon the petition for intervention of Seaboard Air Line Railway Company, after argument of counsel,

It is ordered, adjudged and decreed, that Seaboard Air Line Railway Company be and is hereby allowed to intervene herein and is

made a party plaintiff in this cause, as in its said petition for intervention prayed. Let said petition and this order be filed as a part of the record.

This 12 day of September, 1923.

Sam'l H. Sibley, U. S. Judge.

[File endorsement omitted.]

[fol. 76] EXHIBIT "A" TO PETITION FOR INTERVENTION

Amended Uniform Contract for Express Operations Over Rail Lines

Agreement Between —— —— and American Railway Express Company

Effective March 1, 1923

[fol. 77] (Insert to Exhibit "A")

(Copy)

246-4

American Railway Express Company, Southern Departments, Atlanta, Ga.

August 7th, 1922.

Mr. Chas. R. Capps, First Vice-President Seaboard Air Line Railway, Norfolk, Va.

DEAR SIR: Referring to the amended uniform contract for express operations between the Seaboard Air Line Railway Company, and its various subsidiary companies, and the American Railway Express Company, effective March 1, 1923, I beg to say that the following is our interpretation, or understanding, of the provisions referred to in the contract and this interpretation we believe to be wholly in accord with the meaning and spirit of the contract.

Article I—Section 2

It is understood that the American Railway Express Company will not voluntarily establish carload rates over the lines of the Seaboard Air Line Railway Company, or its subsidiaries, without having first secured the consent and approval of the Seaboard Air Line Railway Company.

Article III—Sections 1 and 4

It is understood that the Express Company will not voluntarily establish or perform express refrigerating service on the Lines of

the Seaboard Air Line Railway Company, or any of its subsidiaries, without first obtaining the consent of the Seaboard Air Line Railway Company.

Article III

It is understood by the Express Company, that when the Rail Company has not a sufficient number of cars for passenger service to accommodate the express business offered, any deficiency may be supplied with freight cars suitable for freight train service.

Article XI

It is understood that, where the Express Company requires the service of a joint railroad and express agent as a witness in court the Express Company shall pay for the services of a relief agent during the absence of the witness, and the expenses of the witness while absent.

Article XVII

It is understood that, in the event any refrigerator cars are handled in express service under refrigeration, the Express Company will look after and be responsible for the icing of such cars.

Yours truly, (Signed) Wm. G. Smith, Vice-President.

[fol. 78] This agreement, made this — day of ——, ——, between —— ——, hereinafter called the "Rail Company," and the American Railway Express Company, hereinafter referred to as the "Express Company,"

Witnesseth, that for and in consideration of the mutual covenants, separate services and payments hereinafter recited to be by the parties kept, performed and made, the parties do hereby agree as follows:

[fol. 79] That the agreement entered into between the parties hereto, known as the "Uniform Contract for Express Operations" effective on the first day of September, 1920, is hereby amended to read as follows:

Article I

Definitions—Exceptions—Explosives

Sec. 1. The express transportation business to be carried on under this contract is understood to mean such express transportation business as was commonly carried on by express companies as of December 27, 1917, and for the purpose of this contract it is agreed that the express business contemplated by this contract shall include all matter commonly carried as express on December 27, 1917, on passenger, express, or mail trains of the railroads, except baggage of passengers and theatrical scenery and belongings when handled on regular passenger transportation, United States and railroad mail, and mail equipment, corpses when accompanied by some one in charge, news trunks and property necessary to carry on the usual

news business, also supplies and material for the use of the railroad and its system lines, or for contractors for such railroad or its system lines, and local marketing and package service for individuals on such trains as now exercise that privilege. The Rail Company as well as the Express Company shall have the right to carry on such trains silk and tea imported from the Orient, newspapers, milk and cream, and returned empties; and the Rail Company shall have the right to carry on such trains, equipment, supplies and property owned by any telegraph or telephone company, or by any other person or corporation, or their successors, to whom rights and privileges (other than the right or privilege of operating an express business) have been granted by the Rail Company prior to September 1, 1920; provided, however, that nothing in this agreement shall restrict or limit the right of the Rail Company to operate mixed trains or shall prevent the Rail Company from transporting horses, carriages, or cattle or other classes of freight upon passenger trains [fol. 80] when necessary in emergencies to avoid delay to freight shipments, it being understood, however, that the Rail Company shall not change the designation of a passenger train to a mixed train for the purpose of evading the provisions of this contract; and provided further that where, as of December 27, 1917, the Rail Company was by contract, understanding or practice entitled to the exclusive or joint right to handle any particular commodity upon passenger, mail or express trains, the Rail Company hereby reserves such exclusive or joint right as to such commodity under this agreement; and provided further that no explosives, inflammable articles, or acids shall be considered express traffic except such as it may be lawful to transport on passenger trains when properly packed, marked, and certified to as required by the regulations of the Interstate Commerce Commission or other public authority for the transportation of explosives, by the rules of the American Railway Association. The maximum weight to be carried in any of the cars carrying express business shall not exceed a limit which in the judgment of the Rail Company is necessary for safety. Articles which can only be loaded and unloaded through end doors of express or baggage cars, causing delays to passenger trains in switching for this purpose, shall not be accepted by the Express Company unless a special car is furnished and charged for at the carload rate, and the Express Company shall not accept shipments which cannot be so handled as to avoid unusual delays to the trains of the Rail Company. Provided, however, that nothing in this section contained shall be construed to prevent the Rail Company from performing any transportation service covered by a tariff now in force or required by any present or future law.

Sec. 2. Said express transportation business shall be conducted in an honest, efficient and economical manner and under such rates, charges, classifications, rules, regulations, and practices and subject to such limitations and conditions as are now or may hereafter be [fol. 81] lawfully established, provided: (a) that, where car-load rates are made by the Express Company, the minimum weight shall

not be less than at the same time prescribed by the railway companies for freight, unless otherwise ordered by Federal or State Commissions or concurred in by the Rail Company; and (b) that rates per 100 pounds made by the Express Company shall not be less than twice the prevailing class freight rate, between the same points, and in no event less than twice the prevailing first class freight rate unless otherwise ordered by Federal or State Commissions or concurred in by the Rail Company.

Article II

Grant of Rights

Sec. 1. The Rail Company agrees to let and demise, and by these presents does let and demise, to the Express Company, the exclusive right and privilege, so far as the said Rail Company has the legal right to let such exclusive right and privilege to any one party, to control, conduct and transact all the express transportation business over the lines and upon such passenger, express or mail trains of the said Rail Company as may be agreed to, upon the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this contract, owned or leased, and operated by the Rail Company; but nevertheless subject to the conditions and limitations in this contract contained.

Reservations

Sec. 2. The Rail Company reserves the right to grant to other railroad companies, including electric lines, trackage rights over the lines of railroad covered by this agreement, for the transaction of a passenger and freight business of which express business may be a part; but the Rail Company agrees that such grant of trackage rights shall not be made to such an extent as to defeat the purpose of the grant of substantially exclusive rights contemplated in this agreement, for handling the business which has origin or destination on its lines.

[fol. 82] Sec. 3. The Rail Company further agrees that it will not for compensation knowingly transport valuables, money, goods or property of any description on its own account, or permit its officers, agents or employees to do so on any of its passenger, express or mail trains, excepting that the Rail Company shall have the right to carry on its own account the articles enumerated in Section 1 of Article I.

Lines Not Under This Contract

Sec. 4. The Express Company may arrange, or continue, where necessary, for the proper conduct of its business, to compensate stage lines, water lines, short line railroads and electric lines, and transportation lines in Hawaii, Alaska, Mexico and Canada, on tonnage, flat rate or such other basis as my be most economical; and, except as

to arrangements provided for in this section, the Rail Company shall have the benefit of any contract provisions which the Express Company may have with any other carrier by rail that are more advantageous to such rail carrier than those herein contained, with the understanding that the Rail Company shall not claim as a benefit under this provision any right of termination of this agreement at variance with the provisions of Article XX hereof.

Article III

Cars—Trains—Equipment

Sec. 1. The Rail Company shall as soon as practicable furnish space in cars, adequate in number and suitable for use in passenger, mail, or express train service at passenger train speed; said cars to be properly heated and lighted, and lettered "American Railway Express"; and shall transport such cars on such passenger, mail, or express trains as may be agreed to, from time to time, as necessary to meet the reasonable requirements of the public for express service. The Rail Company shall carry in such cars the express matter, with the safes, packing trunks, and train supplies and equipment of the Express Company, together with the messengers, helpers and guards [fol. 83] of the Express Company, necessary for the handling of such express matter to destination or the proper transfer points.

Special Trains

Sec. 2. If special express trains are run by the Rail Company, it shall be without extra compensation to the Rail Company.

Baggage Cars

Sec. 3. In order that the Rail Company may not be required to run more cars than are necessary, the Express Company shall use the unoccupied space in the baggage and other passenger train cars of the Rail Company to the greatest extent practicable, and the Rail Company shall likewise have the right to use any unoccupied space in any car supplied by the Express Company.

Rented Cars

Sec. 4. Whenever the Express Company to meet emergency shipments is obliged to rent live stock, refrigerator, or other cars to handle such shipments by reason of the railroad on which such traffic originates not owning or controlling suitable cars, or if owning or controlling them, not having them available to meet the requirements of any specific shipment, the Rail Company agrees that it will assume the entire rental payment for such cars when the shipment moves exclusively over its lines; and when the movement is partly over its lines and partly over the lines of one or more other railroads the Rail Company shall assume such part of the rental charge

as the proportion of the Express Company's revenue on the shipment earned on the Rail Company's lines bears to the total revenue of the Express Company on the shipment; provided, however, that where shipper is required to pay an additional charge for such privilege, the rail companies involved will be credited with such additional charge.

Train Stops—Access to Stations and Terminals

Sec. 5. The Rail Company agrees to stop its trains at stations where they are scheduled to stop in such a manner and for such time as will permit the Express Company by due diligence, and with sufficient force, to load on and to unload from trains all express matter carried [fol. 84] or to be carried on such trains as will not unreasonably interfere with the business of the Rail Company, and, under like conditions, the Rail Company shall provide the Express Company, without compensation other than that provided in Articles IV and V, access to and from station platforms, trains and terminals, for its employes, vehicles and other conveyances for the handling, loading and unloading of property or express matter carried or to be carried on trains of the Rail Company. Nothing in this agreement shall operate to interfere with the performance by the Rail Company of any of its obligations in respect to the carriage of the United States mails.

Article IV

Use of Station Building

Sec. 1. In cases where an employe of the Rail Company acts as agent for the Express Company, the Rail Company, to the extent that it reasonably can, shall allow the Express Company the use of a portion of the station buildings now existing or that may hereafter be erected, including appurtenances and conveniences, such as heat, light, and use of telephone at station, without charge to the Express Company, except as otherwise provided in Section 2 of this Article, provided that the Express Company shall pay any additional toll charge made by the Telephone Company.

Rented Rooms

Sec. 2. When separate rooms for use of the Express Company in stations and terminal buildings of the Rail Company are provided by agreement between the said companies, the Express Company shall pay to the Rail Company as rental therefor (monthly) upon the following basis:

The cubical content of the building, or the separate wing or annex, in which the express room or rooms are provided shall be ascertained, and also the cubical content of such room or rooms and [fol. 85] the proportion of the latter to the former shall constitute the basis of rental to be paid by the Express Company at 6 per centum per annum of the original cost (estimated if not known) of said

building, separate wing or annex and of additions and betterments thereto, and of the appraised value of the land thereunder, and the appraised value of the land used for driveways adjacent to the Express Company's room or rooms, and of platforms on property of the Rail Company contiguous to such rooms or rooms, when such driveways or platforms are used exclusively by the Express Company.

The Express Company will also pay for the repairs and maintenance (including a reasonable supervision charge) of such platforms and driveways, and also of elevators used exclusively by the Express Company and located in a room or rooms rented by it upon the foregoing terms.

The Express Company will also pay to the Rail Company the cost (including a reasonable supervision charge) of all necessary repairs to the room or rooms so rented, and an amount for general repairs, such as roofing, painting, etc., to the entire building, wing or annex in which located, on the proportion of cubical content of the express room as provided in this section.

The Express Company, in like proportion, will pay to the Rail Company, insurance, taxes and assessments upon its quarters, such assessments to be equitably apportioned according to the benefit accruing to the Express Company according to the term of its occupancy of said space, and also the cost (including a reasonable supervision charge) of light, heat and water when supplied by the Rail Company, except that the direct cost (including a reasonable supervision charge) shall be paid when ascertainable.

Exclusive Buildings Owned by Rail Company

Sec. 3. In cases where the Rail Company by agreement with the Express Company provides or erects a separate station or terminal building on the right of way or other property of the Rail Com- [fol. 86] pany for the use of the Express Company, it is agreed that the rental to be charged to the Express Company shall be equivalent to six per centum per annum upon the appraised value of the land and the original cost of the building and betterments and additions thereto, with the understanding that the Express Company shall assume the cost of all necessary repairs and an equitable proportion of insurance, taxes, and assessments, and of the cost of heat, light or water when supplied by the Rail Company.

Buildings Erected by Express Company—Purchase of Express Buildings

Sec. 4. In cases where it is agreed with the Rail Company that the Express Company itself shall erect a separate or distinct station or terminal building on the Rail Company's property, the Rail Company agrees that it will lease to the Express Company at a rental of 6 per centum per annum of the appraised value of land (plus taxes), with a minimum rental of five dollars per annum, including taxes, land suitably situated which is not otherwise required for the Rail Company's own purposes; and if the Express Company shall cease to do

the express business on the lines of the Rail Company, the Rail Company shall purchase from the Express Company such buildings so erected at cost, less depreciation, at the time of such cessation.

The Rail Company further agrees that in the event the Express Company shall cease to do express business on the line of the Rail Company, it will then purchase any buildings then owned by the Express Company heretofore erected on the land of the Rail Company at the cost of such building less depreciation at that time.

Union Stations or Terminals

Sec. 5. The Rail Company further agrees that it will use its influence to secure for the Express Company, convenient and adequate office or warehouse facilities, if desired, for the transaction of its express business in union depots or stations with which the Rail Company has or may have arrangements for terminal facilities during the existence of this contract, on substantially the same terms and [fol. 87] conditions as if the union depots or stations were owned by the Rail Company.

Sec. 6. All leases entered into between the Rail Company and the Express Company under this Article shall be in accordance with the provisions of this agreement relating to liability as defined in Articles VII and XI hereof.

Sec. 7. All switch tracks, side tracks and other tracks used or furnished for handling express business shall be considered as railroad facilities furnished by the Rail Company for the compensation provided in Article V of this agreement, and without other compensation or charge.

Article V

Compensation

The amount to be paid to the Rail Company by the Express Company as compensation for the privileges covered by this contract as amended herein (in addition to other payments herein provided for) shall be determined in the following manner:

Sec. 1. Upon carload shipments consigned from one consignor to one consignee at one destination, moving under carload rates which exclude vehicle service, the Express Company shall first pay to the Rail Company 85 per centum of the gross revenue accruing on its lines from the rail haul (not including in the gross revenue from the rail haul any charges separately ascertainable for refrigeration, partial loading or unloading in transit and other accessorial services), the remaining 15 per centum of such gross revenue from the rail haul, together with the charges for any separate vehicle service, refrigeration, partial loading or unloading in transit and other accessorial services, shall remain in the revenue of the group (item (a), Sec. 4, of this Article) in which such charges accrue.

[fol.88] Sec. 2. The Railroads and other carriers on the lines of which the Express Company conducts operations shall be divided into the groups described as follows, except as any line or lines may hereafter be assigned to a different group by the Interstate Commerce Commission in its grouping for rate making purposes:

Grouping of Transportation Lines

(A) Eastern Group.—Including generally the carriers operating in the territory embraced in the following limits: the Atlantic seaboard from the Canadian border to Norfolk, Va., the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., the main line of the Chesapeake & Ohio Railway from Kenova, W. Va., to Cincinnati, Ohio, the Ohio River to Cairo, Ill., the Mississippi River to the mouth of the Illinois River, at or near Grafton, Ill., the Illinois River from Grafton, Ill., to Pekin, Ill., a line south and east of the Atchison, Topeka and Santa Fe Railway from Pekin, Ill., through Joliet and Streator, Ill., to Chicago, Ill., a line drawn from Chicago, Ill., to include the southern peninsula of Michigan, and thence following the international boundary to the Atlantic seaboard; including that portion of the Virginia Railway extending south of the southern boundary (excluding those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line extending north of the southern boundary), and all other carriers mentioned in Exhibit A hereto, whether located in the United States or not, and any other lines located in the territory covered by the Eastern Group over which the Express Company may hereafter operate.

(B) Southern Group.—Including generally the carriers operating [fol. 89] in the territory commonly known as the southern classification territory, embracing that section of the United States lying west of the Atlantic Ocean; south of the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., thence south of the Chesapeake & Ohio Railway to Cincinnati, and thence south of the Ohio River to Cairo, Ill.; thence east of the Mississippi River to New Orleans, La., and the mouth of the Mississippi River; and north of the Gulf of Mexico from the Mississippi River to the Atlantic Ocean; including also those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile and Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line Railway extending north of the northern boundary (excluding that portion of the Virginian Railway extending south of the northern boundary), and all other carriers mentioned in Exhibit B hereto, whether located in the United States or not, and other lines located in the territory covered by the Southern Group over which the Express Company may hereafter operate.

(C) Western Group.—Including generally the carriers operating in the territory lying west of the Western boundaries of the eastern and southern groups as above described; south of Lake Superior and of the international boundary line; north of the Gulf of Mexico and

the Rio Grande, and on and east of a north and south line running as follows: Following the boundary line between the state of North Dakota and the state of Montana and the boundary line between the states of South Dakota and Wyoming and Nebraska and Wyoming to the line of the Union Pacific extending east from Cheyenne, Wyo.; then following the line of the Union Pacific west- [fol. 90] ward to Cheyenne and from Cheyenne running southward through Denver, Colorado Springs, Pueblo, and Trinidad, Colo.; then following the line of the Atchison, Topeka & Santa Fe Railway through Raton and Las Vegas, New Mexico, to Albuquerque, New Mexico; then south along the line of the Atchison, Topeka & Santa Fe Railway to El Paso, Texas, and all other carriers mentioned in Exhibit C hereto, whether located in the United States or not, and any other lines located in the territory covered by the Western Group over which the Express Company may hereafter operate.

(D) Mountain-Pacific Group.—Including generally the carriers operating in the territory lying between the north and south line, described in paragraph (C) hereof, and the Pacific Coast, also carriers operating in Alaska, Hawaii, British Columbia, the Yukon and Mexico, and all other carriers mentioned in Exhibit D hereto, whether located in the United States or not, and any other lines located in the territory covered by the Mountain-Pacific Group, over which the Express Company may hereafter operate.

The lines embraced in the several groups are more particularly set forth in Exhibits A, B, C and D, attached hereto and made a part of this agreement, it being understood that said Exhibits shall prevail in case of any minor departures contained therein from the geographical descriptions of groups above given.

Apportionment of Express Revenues

Sec. 3. The gross express transportation revenues accruing on each railroad or other carrier in the several groups, including the lines of the Rail Company party to this contract, shall be ascertained by crediting each railroad or other carrier with the express revenue earned wholly thereon and prorating the revenue accruing between points involving transportation on the lines of two or more carriers, as follows:

[fol. 91]

Through Revenues

The gross transportation revenues accruing from the carriage of express matter on the line of the Rail Company when carried by the Express Company partly on and partly beyond the line of the Rail Company, shall be such portion of the through transportation charge of the Express Company as the local first class express rate per 100 lbs. between points where carried on the line of the Rail Company bears to the sum of the local first class express rates per 100 lbs. between points where carried on the several lines or routes operated by the Express Company over which such express matter moved.

Sec. 4. When used in this Section and in Sections 5 and 6 of this Article—

The term "Uniform System of Accounts" means the Uniform System of Accounts for Express Companies, now or hereafter prescribed by the Interstate Commerce Commission.

The term "Classification" means one of the several groups of accounts embraced in the Uniform System of Accounts, such as the Classification of Operating Revenues.

The term "Form of Income Statement" means the form for stating income accounts embraced in the Uniform System of Accounts.

The term "Carload Business" means that carload business which is described in Section 1 of this Article.

All references in this Section to classifications, captions, names and numbers of accounts and forms of statements mean the classifications, captions, names and numbers of accounts and forms of statements as embodied in the Uniform System of Accounts, issue of 1914.

There shall be ascertained the following items of income accruing to the Express Company from its operations on the lines of all railroads and other carriers over which it performs service within each group for each month during which this contract shall remain in effect. Such items of income shall be as defined in the Uniform [fol. 92] System of Accounts or the rulings of the Interstate Commerce Commission in connection therewith, viz.:

(a) Total charges for transportation (including charges based upon value), less amounts paid by the Express Company under Section 5, Article XVI, hereof, not included in operating expenses, and less the 85 per centum of carload revenue payable by the Express Company under Section 1 of this Article. This item shall include the operating revenues of the Express Company as defined in Primary Accounts Nos. 101 and 103 in the Classification of Operating Revenues, after deducting the 85 per centum of carload revenue referred to herein.

(b) Total revenues from Operations other than Transportation. This item shall include operating revenues of the Express Company as defined in General Account III, "Operations Other than Transportation" in the Classification of Operating Revenues.

(c) Other Income. This item shall include all other income of the Express Company as listed under Caption II "Other Income" in the Form of Income Statement.

(d) Profit and Loss Credits. This item includes the following accounts:

Profit on Real Property and Equipment Sold (not including profit on land and buildings).
Delayed Income Credits.
Unrefundable Overcharges.
Miscellaneous Profit and Loss Credits.

NOTE.—There shall not be included in items (a) to (d) inclusive any items of income accruing to the Express Company as interest or [fol. 93] other return from the use of funds or other property not em-

ployed in or arising from the conduct of express operations under this agreement, the amount of which funds or the cost of which other property is not included in the value of the Real Property and Equipment and other capital referred to in Section 5 of this Article.

From the total of items (a) to (d) inclusive, shall be deducted the following items of expense as defined in the Uniform System of Accounts or the rulings of the Interstate Commerce Commission in connection therewith, for the group for the same period:

(e) All Operating Expenses of the Express Company, including depreciation and the several payments, expenses and indemnities undertaken by the Express Company referred to in Articles IV, VII, VIII, IX, XI, and XVII.

The depreciation mentioned above shall be at the rates now used by the Express Company or as may be modified by agreement hereafter between the parties hereto or fixed by the Interstate Commerce Commission.

(f) Compensation to carriers, over the lines of which the Express Company operates, not parties to this form of contract as amended herein, and also the portion retained by the Express Company of the 2½ per centum set aside for it under Article V of contracts heretofore entered into by the Express Company in the form of the Uniform Contract for Express Operations without the amendments provided for by this agreement.

(g) Uncollectible Revenue from Transportation.

(h) Express Taxes, less Federal Income Tax on Express Company's net income.

[fol. 94] (i) Other Deductions.—This item includes accounts listed under Caption III, "Deductions from Gross Income" in the form of Income Statement.

NOTE.—Included in this item shall be the amount paid or sustained, if any, as interest and discount on funds borrowed and expended for additional property and equipment necessary for use in the express business not exceeding 7 per centum per annum but this borrowed money as long as it remains unpaid shall not be considered as a part of the average value of the entire real property and equipment and other capital employed in the express business. No interest or discount shall be included under this clause until the equivalent of the depreciation reserve shall have been expended for real property or equipment employed in the conduct of express operations.

(j) Profit and Loss Debits.—This item includes:

Delayed Income Debits.
Miscellaneous Profit and Loss Debits.

NOTE 1.—There shall not be included in items (e) to (j) inclusive any items of expense or other deduction borne by the Express Company in connection with or arising from the use of funds or other property not employed in the conduct of express operations under this agreement, the amount of which funds or the cost of which property is not included in the value of the real property and equipment and other capital referred to in Section 5 of this Article.

NOTE 2.—The basis for the apportionment among the groups affected, of operating expenses and other charges, included in items (e) to (j) inclusive, which are common to more than one group, will be as already agreed upon or as may be hereafter agreed upon [fol. 95] by the appropriate committee of the Rail Companies, established under Article XVIII hereof, and the Express Company.

It is understood and agreed that the items of income and expense referred to in this Section comprise income and expense of the period of the contract as amended herein and no other, provided that there may be included in the monthly accounts reasonable estimates of the amounts of items properly applicable thereto which are not definitely known or audited at the time of closing the respective month's accounts.

Income for Division—Apportionment

The balance remaining after this deduction shall be designated as "Income for Division" and from it shall first be set aside for the Express Company an amount equaling 2½ per centum thereof. The remaining balance shall be designated as "Net Income for Division" and shall be distributed among the railroads in the group executing this form of contract as amended herein, including the Rail Company party to this contract, in the proportion that the gross express transportation revenues on other than carload business for the month earned on the line of each such railroad bears to the gross express transportation revenues on other than carload business earned on the lines of all such railroads in that group for that month.

Effective from and after four months after the effective date of this contract as amended herein, where a majority of the rail mileage in any group shall decide upon an allocation of expenses among the several lines in the group, and not upon a group basis of expenses divided by the revenue of each line as herein provided, then and in that event, the Express Company shall so allocate the expenses to the individual line, charging to the same all direct expense and its proper proportion of joint expense. The operating expense of the individual line, so arrived at, shall be deducted from its revenues in arriving at "Income for Division" instead of as otherwise provided for herein. [fol. 96] From "Income for Division" thus arrived at for each line shall be set aside for the Express Company a sum equaling 2½ per centum thereof, leaving the remainder to be paid to the Rail Company.

If any differences arise as to the proper proportion of joint expense, they shall be disposed of as provided for in Article XVIII hereof. Any expense attributable to performing this work shall be charged by the Express Company to the group requiring it.

If decision provided for herein is given to the Express Company later than the effective date of this contract as amended herein, then the effective date for inaugurating the allocation of expenses among individual lines in a group shall be correspondingly deferred.

Division of Income Over 6% on Express Property

Sec. 5. As a further consideration, the Express Company agrees that for each period or year ending December 31st in which this contract as amended herein is in force during which the sum of the amounts set aside for it at 2½ per centum of the "Income for Division" in the several groups under the contract as amended herein, plus the portion retained by the Express Company, referred to in item (f), Section 4, of this Article, shall exceed six per centum per annum on the average value of the entire real property and equipment and other capital of the Express Company employed in the express business (other than that represented by funds borrowed and not repaid, as set forth in the note under item (i) of Section 4 of this Article), the income from which is included in Section 4 hereof, such excess or such part thereof as shall not exceed two per centum per annum on such average value shall be divided in the following manner: One-half to the Express Company and the other half to the railroads, parties to this form of contract as amended herein, apportioned among the several railroad companies in the following manner—first credit to each group that proportion of one-half of such excess which its contribution of "Income for Division" for the period or year bears to the total contribution of all groups, and then dis- [fol. 97] tribute among the lines in a group, parties to this form of contract as amended herein, in the proportion that the gross express transportation revenue on other than carload business for the period or year earned on the line of each such railroad, bears to the gross express transportation revenue on other than carload business earned on the lines of all such railroads in that group in that period or year.

In the event such excess over six per centum per annum shall be greater than two per centum per annum on said average value, then such excess over two per centum per annum shall be divided one-quarter to the Express Company, and three-quarters to the railroads parties to this form of contract as amended herein, apportioned among the several railroad companies in the same manner.

It is agreed that the value of the real property and equipment and other capital hereinabove referred to, which shall be used as the basis for determining the excess as provided in the preceding paragraphs of this Section, shall be:

(a) The average book value of real property and equipment, including Additions and Betterments (except as provided in the note under item (i) of Section 4 of this Article) employed in the express business, less the average amount of accrued depreciation on such property and equipment plus

(b) The average book value of materials and supplies employed or to be employed in express operations under this agreement.

It is understood that the aggregate net total of these items as of May 1, 1922, was $28,143,359.97. The Express Company shall monthly advise the Rail Company of changes therein. The average book values herein referred to shall be computed for the period or year ending December 31st.

[fol. 98] Payments

Sec. 6. The Express Company shall estimate as nearly as may be the amount payable to the Rail Company as its monthly proportion of the "Net Income for Division," under Section 4 of this Article, and shall pay to the Rail Company on or before the last day of each month the amount so estimated to be due as a result of operations of the previous month. The actual amount due for each such month shall be ascertained by the Express Company as early as may be, and payment of any balance remaining due thereon shall be made to the Rail Company within 120 days after the close of such month. If the actual amount due the Rail Company for the business of such month shall be less than the amount already paid by the Express Company under the provisions of this paragraph, the Express Company shall have the right to deduct the amount of such overpayment from the next or any succeeding payment due to the Rail Company hereunder.

After the accounts for any month have been closed they shall not be reopened to include adjustments affecting such month, unless in the judgment of the Committee appointed under Clause "C" of Article XVIII hereof, the amount of such proposed adjustment is sufficiently large to warrant such reopening and the restatement of the accounts. Other necessary adjustments in the accounts under this Article shall be included in the first current open month's accounts after discovery which will admit of their inclusion without delay to the rendering of that month's accounts.

The proportion of the excess over six per centum per annum assignable to the railroad companies executing this form of contract as amended herein, under the provisions of Section 5 of this Article, which is payable to the Rail Company, shall be ascertained by the Express Company and paid over to the Rail Company within 120 days after the close of each calendar year.

Settlement at Termination of Contract

With respect to any and all claims, demands, charges and expenses of every kind and character whatsoever, for which the Express Company may be or become liable, or earnings in which the Rail [fol. 99] Company may be interested, arising or growing out of the express business on the Rail Company's lines, but not ascertained, definitely fixed, or charged on the Express Company's books at the termination of this agreement, in the final settlement between the parties hereto, such claims, demands, charges, expenses or earnings shall be estimated and allowed as may be determined by the General Accounting Officers of the parties, and in case of their failure to agree, shall be determined as provided in Article XIV hereof.

Article VI

The Express Company shall as soon as practicable furnish adequate and suitable equipment, and shall use its vehicles, property,

offices, and other facilities, and its agents and employes in operating an express transportation business on the Rail Company's lines; and in the conduct of said business shall exert itself in all proper ways to make said business satisfactory to the public and to the Rail Company.

Article VII

As between the Rail Company and the Express Company, the Express Company shall be liable:

(a) For any and all claims on account of loss of, or damage or delay to, its own property, or the property of others in its charge carried under the provisions of this contract;

(b) For any and all injury to, or death of, its agents or employees while engaged in its business on any of the lines or premises covered by this contract;

Liability

(c) For any and all damage to property other than that mentioned in paragraph (a) of this Article (except as otherwise provided [fol. 100] in this agreement as to any particular property), and for injury to, or death of, other persons than those mentioned in paragraph (b) of this Article, where such damage, injury or death is due to, caused by, or contributed to, by the act or negligence of the Express Company, its officers, agents, or employees; provided, however, that in claims for such loss, or damage, or injury to such property, or injury to, or death of, such other persons, where it appears that the loss, or damage, or injury, or death was caused by the joint negligence of the Express Company and the Rail Company, the responsibility shall be joint, and in such event any loss shall be borne in proportion to the extent to which the negligence of each party contributed to produce the loss, damage, injury, or death; and in case of disagreement between the parties hereto arising out of the application of this proviso, such disagreement shall be settled by arbitration, as hereinafter provided. The Express Company shall indemnify and save harmless the Rail Company or any agent or employe of the Rail Company against all claims, demands, suits, and actions whatsoever, including expense of litigation, that may be begun against any of the same on account of any claim arising or growing out of the undertaking as above assumed, whether in law or in equity or before any compensation board, tribunal, or court whatsoever.

Article VIII

Service for Rail Companies—Liability

The Rail Company shall have the right to require the transportation without charge by the Express Company, so far as the Express Company may lawfully carry without charge, over any and

all lines of the Rail Company, and over lines of any generally recognized transportation system of which the Rail Company is a part and over which lines the Express Company has a contract or contracts in the form hereof, of all packages of money, valuables, papers, and shipments of materials and supplies ordinarily forwarded by express, used in the operation of the Rail Company: Provided, however, that the Express Company shall not be liable for any loss of or [fol. 101] damage to such shipments so carried unless caused by the theft, dishonesty, negligence or other wrongful act of the employees of the Express Company. When the Express Company and the Rail Company employ the same agents, the receipt of the express messenger on the train for railway property shall constitute a delivery to the Express Company and the receipt of the party to whom the package may be addressed or his representative shall constitute a delivery by the Express Company.

Article IX

Service for Express Company—Liability

The Rail Company shall, so far as it lawfully may, transport upon the passenger and express trains of its lines, free of charge, the Express Company's messengers, helpers and guards, and shall carry on trip passes to be issued by the Rail Company on proper application therefor, the agents and employees of the Express Company when engaged in conducting and handling the express business passing over the lines of the Rail Company, subject to the same rules and regulations as govern the free or reduced rate transportation of the agents and employees of the Rail Company; and officers having supervision of express business on lines of the Rail Company will be provided with annual passes on proper application therefor; also shall transport without charge any express matter that the Express Company may be now or hereafter privileged by law or authority of the Interstate Commerce Commission, or other body having jurisdiction, to carry free. It shall also transport free of charge upon the frieght trains of its lines, within reasonable distances, the equipment, material and supplies (excepting hay, grain and gasoline) of the Express Company required for use by it on such lines. It shall, so far as it lawfully may, also transport free of charge, equipment, stationery and office supplies of the Express Company in cars or parts of cars set apart for the use of the Express Company. The Express Company assumes the risk of loss, damage or injury resulting from all such transportation, and agrees to indemnify and save harmless the Rail Company from all claims for loss, damage or in- [fol. 102] jury, including expense of litigation, arising from such transportation.

Article X

Telegraph or Telephone

The Rail Company will transmit so far as it may be free to do so, without charge, over all telegraph or telephone lines owned or con-

trolled by the Rail Company, business messages relating to the express transportation business of the Rail Company conducted by the Express Company: Provided, however, that the Express Company releases and holds harmless the Rail Company from all liability arising from any error or delay in the transmission of such messages or from failure to forward and deliver the same.

Article XI

Joint Employees—Rules

Sec. 1. The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company, and the Rail Company may arrange with the Express Company for the agents and express messengers and other employees of the Express Company to act as station or train employees of the Rail Company, subject to the rules of the Rail Company, upon such terms as may be agreed upon by the two companies.

Liability

Sec. 2. In case any injury, loss or damage is caused by a joint employe while engaged exclusively in the service of one of the parties hereto, liability therefor shall, as between the parties hereto, be exclusively the liability of the party in whose service such joint employe was at the time engaged.

In case it cannot be determined whether, at the moment, such joint employe was engaged exclusively in the work of either of the parties hereto, then the Express Company and the Rail Company shall jointly assume liability and bear the costs and expenses of set- [fol. 103] tlement in the proportion in which the wages paid at the time of the injury by each bear to the total wages, and in such case no settlement shall be made by either party without the consent in writing of the other.

Liability

Sec. 3. Liability for personal injury to or death of any joint employees, when it can be determined that such injury or death was sustained while the employe was engaged exclusively in express service, shall be borne by the Express Company, and the Express Company shall bear all costs and expenses incident to the settlement thereof. When it can be determined that such injury or death was sustained while the employe was engaged exclusively in railroad service, the Rail Company shall assume liability and bear all costs and expenses incident to the settlement thereof. In case of injury or death, where it cannot be determined whether at the moment the joint employe was employed in work exclusively for the Rail Company or exclusively for the Express Company, the Express Company and the

Rail Company shall jointly assume liability and bear the cost and expenses of settlement in the proportion in which the wages paid at the time of the injury by each bear to the total wages, in which latter case no settlement shall be made by either party without the consent of the other in writing.

Article XII

Loading and Unloading

The Express Company shall load and unload its express matter, or require the shippers and consigness to do so.

Article XIII

Rules

All of the agents and employees of the Express Company while on the premises or on lines of the Rail Company, shall at all times conform to the general rules in force thereon, and in case any messenger or other employe on any said lines shall from any cause be objectionable to the Rail Company, he shall be removed or discharged upon [fol. 104] the written request of the Rail Company or of the Rail Company's principal operating representative.

Article XIV

Settlement of Controversies

Any disagreement which may arise as to this agreement or as to any question growing out of the same as between the parties hereto or between the Express Company and any Committee provided for in Article XVIII hereof or as between members of any group in respect of any subject matter involved herein, may be submitted for disposition to the determination of the Interstate Commerce Commission, or upon request of any party involved in any such disagreement shall be arbitrated. In the event of arbitration each party to such arbitration shall select one arbitrator and the two so chosen if they cannot agree shall select a third arbitrator and the decision by a majority of such arbitration board shall be a condition precedent to any further action; provided, however, that if either party fails to select an arbitrator within thirty days after notice from the other of a desire to submit a matter to arbitration, the party not in default as to the appointment of an arbitrator shall have the right to appoint an arbitrator for the party in default and the two thus chosen shall choose a third. If two arbitrators selected as herein provided shall fail for thirty days, where necessary, to select a third, the third may, upon the application of either party, be selected by the Chairman of the Interstate Commerce Commission. In any such arbitrations each party shall pay the expense of its own arbitrator and all other cost thereof shall be divided equally.

Article XV

Car Mileage

The Rail Company shall allow the Express Company, under the rules of the American Railway Association or similar body, the usual mileage or per diem rates on all cars owned, leased, rented or controlled by the Express Company moving over the railroad lines operated and controlled by the Rail Company.

[fol. 105]

Article XVI

Switching Cars

Sec. 1. The Rail Company agrees to provide, without compensation other than as provided in Article V of this contract, all switching of cars in express service, such as ordinary switching in connection with regular or special trains at stations or union depots involving movements to and from the stations or union depots, and also to and from tracks or sidings for the handling of express traffic at stations or union depots and delivery of cars to connecting railroads.

Switching Live Stock

Sec. 2. The Rail Company also agrees to provide, without compensation other than as provided in Article V of this contract, all necessary switching of cars for icing in transit, also switching of cars for live stock in transit to and from stock chutes or stock yards for loading, unloading feed, water, or rest.

Terminal and Belt Lines

Sec. 3. When, in transferring cars in express service to another contract line, it is necessary to switch such cars over terminal, belt, or short line railroad because of the lack of the Rail Company's physical track connection with the other contract line, the cost of such switching shall be paid by the transferring Rail Company.

Bridges Ferries, and Lighters

Sec. 4. When, in order to handle express matter to and from a point contiguous to the end of the rail line, or to reach the lines of a connecting railroad, it is necessary to use a bridge, ferry, float or lighter service, the bridge and ferry tolls and float or lighterage charges shall be borne by the originating, delivering, or transferring Rail Company as the case may be.

Sec. 5. All switching, ferrying, float or lighterage referred to in the foregoing Sections 1, 2, 3 and 4 will apply only when such switching, ferrying, float or lighterage has to do with the usual transportation by the carrying line to or from or between the points where the rate applies under which the carrying line handled the shipment. For

[fol. 106] all special switching, ferry, float or lighterage service, performed for the Express Company, it shall pay such reasonable charge as the Rail Company may establish.

Sec. 6. Adequate charges for demurrage on cars carrying carload traffic, so far as it lawfully may be done, shall be assessed by the Express Company, in order to insure the prompt loading and unloading of express matter to and from cars on the line of the Rail Company and payments of such charges shall accrue to the Rail Company.

Article XVII

Refrigeration

The Express Company agrees that the icing and refrigeration of cars in the service of the Express Company while on the lines of the Rail Company shall be performed by the agency employed by the Rail Company for this purpose, for account of the Express Company,the Rail Company agreeing that the charges for such service shall be reasonable.

Article XVIII

Competitive Traffic

To insure and preserve a proper and equitable proportion of all competitive business to the Rail Company and to other carriers having similar contracts with the Express Company, the latter Company agrees to divide the competitive traffic upon a fair and equitable basis between the said carriers, giving due consideration to the distribution of competitive traffic enjoyed by them during the three years ending December 31, 1917, and to the elements of service, direct routing, car supply and terminal facilities. To establish and preserve co-operation between the parties hereto, and also between them and the other carriers that may enter into similar agreements, the Express Company agrees that records and statistics relating to the division of competitive traffic shall be kept by the Express Company and shall be subject to inspection for and on behalf of the Rail Company.

[fol. 107] The accounts of the Express Company shall be kept in the form and manner now or hereafter prescribed in the accounting orders of the Interstate Commerce Commission, and the Rail Company, and such other carriers as shall enter into a similar agreement with the Express Company, shall have the right to inspect such accounts at any and all reasonable times through their duly authorized agents, and the Rail Company and such other carriers as may become parties to a similar agreement with the Express Company may from time to time at their own expense require the Express Company to furnish such special statistics or special statements as may be required in connection with the operations under

this contract, provided, however, that for the purpose of economy and to avoid unnecessary interruption of the express business by having each carrier inquiring into the accounts and operations and requiring statements and statistics, to insure equitable treatment to all the carriers and to make the provisions of this Article effective, the Rail Company acting in conjunction with other carriers, reserves the right to create at any time, a Committee or Committees, representing the carriers as a whole, each Committee so formed to include one representative of the Short Lines not attached to any of the larger systems, and the Rail Company and the Express Company agree that if and when such Committees are created, and approved by the Association of Railway Executives they shall have, after conference with the representative or representatives of the Express Company designated by its President, final determination (within the terms and intent of the contract) of matters relating to (A) routing of competitive traffic, rates, divisions, and other traffic matters, (B) facilities, equipment, lading, economies in movement of express business and similar operating matters, (C) allocation of revenues and expenses, accounts and statistics, as contemplated in this agreement, provided that the Express Company shall retain initial jurisdiction and management of all such matters and may appeal to the Association of Railway Executives in the event the [fol. 108] final determination of any such question is not acceptable, and if the decision of said Association shall be objected to by the Express Company it may then have such question determined as a disagreement under Article XIV of this agreement. The several items of income, expenditures and deductions under Section 4 of Article V of this agreement shall, within a reasonable time, be subject to the objection of the Rail Company or of the Committees provided for herein, as to the nature or the amount thereof, and if any differences continue to exist after consideration by the Association of Railway Executives in respect thereto, such differences shall be determined by arbitration under the provisions of Article XIV of this agreement. In the absence of fraud or concealment on the part of the Express Company, no objection contemplated by this Article, in so far as it relates to actual expenses already paid or incurred being unnecessary or excessive, shall be given a retroactive effect to a date earlier than the date such objection, after being stated in writing to the Express Company, may be reasonably and practicably complied with, but estimates and accruals when found by the Committee acting under Clause (C) above, and agreed to by the Express Company, to be excessive shall be adjusted from the dates of such estimates and accruals.

Article XIX

It is hereby recognized that the revenue from the express business should, after the payment of expenses, be sufficient to constitute fair compensation not only to the Express Company, but also for the service of the Rail Company in the express business and that rates should from time to time be established adequate to produce such

revenue, and that such rates should be properly related to the rates for passenger, mail and freight transportation. The Express Company hereby agrees to take such action to secure such rates as may at any time become necessary either before the Interstate Commerce Commission or before the several state commissions, or both.

[fol. 109] Article XX

All of the contract provisions embodied herein are agreed to by both the Rail Company and the Express Company as being inseparable and interdependent, and shall take effect on March 1, 1923 and the agreement effective September 1, 1920, as hereby amended, unless sooner terminated as hereinafter provided, shall continue in force until midnight on February 29, 1928.

This agreement may be terminated at midnight on August 31, 1925, by the giving of written notice by either party to the other as hereinafter provided.

In the event the Rail Company desires to terminate the agreement on August 31, 1925, it shall give written notice to the Express Company upon any date prior to March 1, 1925, and it is further agreed that in this event the Rail Company shall purchase from the Express Company and the Express Company shall sell to the Rail Company at cost, less depreciation accrued up to August 31, 1925, the Express Company's property located on the line of the Rail Company and employed in the express business. The Rail Company shall also take over such office leases and operating contracts as the Express Company may have on the lines of the Rail Company in connection with the conduct of the express business thereon; it being further agreed that the Rail Company shall not be bound to assume any such lease or operating contract beyond February 29, 1928.

In the event the Express Company desires to terminate the agreement effective August 31, 1925, it shall give written notice to the Rail Company on any date prior to April 1, 1925, and in this event there shall be no obligation on the part of the Rail Company to purchase the Express Company's property or to take over office leases and operating contracts on the lines of the Rail Company.

Article XXI

It is mutually agreed that the agreement effective September 1, 1920, as hereby amended, and all of the benefits and obligations [fol. 110] thereof, shall inure to and be binding upon the successors and assigns of the parties hereto.

In witness whereof, the parties hereto, by their proper officers thereto duly authorized, have respectively executed these presents in duplicate as of the day and year first above written.

American Railway Express Company, by —— ——. Attest: —— ——, Secretary. —— ——, by —— ——. Attest: —— ——, Secretary.

[fol. 111] I, F. P. Small, Secretary, W. B. Clark, Assistant Secretary, American Railway Express Company, do hereby certify that at a meeting of the Board of Directors of said company, held at its office in New York City on Thursday, July 13, 1922, at which a quorum was present, the following resolution was adopted:

"Whereas, it appears necessary that the Operating Vice-Presidents of this Company, as well as the President thereof, be clothed with authority to execute contracts between this Company and the various railroad companies covering express operations,

Resolved, that G. C. Taylor, President; R. E. M. Cowie, Vice-President; E. A. Stedman, Vice-President; C. D. Summy, Vice-President; A. Christeson, Vice-President; W. G. Smith, Vice-President, or either of them, be and they are hereby authorized to execute on behalf of the American Railway Express Company the Amended Uniform Contract for Express Operations over Rail Lines, with rail lines and other carriers with which such contracts may be desired."

In witness whereof, I have hereunto set my hand and the official seal of said company, this — day of ——, 1922.

—— ——, Secretary.

[fol. 112] EXHIBIT "A" TO UNIFORM CONTRACT FOR EXPRESS OPERATIONS OVER RAIL LINES

Eastern Group

Adirondack & St. Lawrence R. R.
Akron, Canton & Youngstown Ry. (The)
Albany Southern R. R.
Ann Arbor R. R. (The)
Arcade & Attica R. R.
Arcadia & Betsey River Ry.
Atlantic & St. Lawrence R. R.
Atlantic City R. R.

Baltimore & Ohio R. R. (The)
Baltimore, Chesapeake & Atlantic Ry.
(Including S. S. Lines.)
Baltimore Steam Packet Co.
Bangor & Aroostook R. R.
Barnegat R. R.
Bath & Hammondsport R. R.
Bellefonte Central R. R.
Bessemer & Lake Erie R. R.
Bloomsburg & Sullivan R. R.
Boothbay Harbor & Wiscasset Steamboat Line.
Boston & Albany R. R.
Boston & Maine R. R.
Boyne City, Gaylord & Alpena R. R.
Bridgton & Saco River R. R.

Buffalo & Susquehanna R. R.
Buffalo, Rochester & Pittsburgh Ry.
Buxton Line.

Cambria & Indiana R. R.
Central Indiana Ry.
Central Maine Power Co.
Central New England Ry.
Central New York Southern R. R.
Central R. R. of New Jersey (The)
Central Vermont Ry.
Central West Virginia & Southern R. R.
Champlain & St. Lawrence R. R. (The)
Chautauqua Traction Co. (The)
Cherry Tree & Dixonville R. R.
Chesapeake & Ohio Ry. (The)
All of the system except branch lines as follows: Catlettsburg, Ky. to Elkhorn, City, Ky., Ashland, Ky., to Louisville, Ky., and all branches and spurs connecting therewith.
Chesapeake Beach Ry.
Chesapeake Western Ry.
Chicago & Alton R. R. (The)
That portion of the line east of Pearl, Ill.
Chicago & Eastern Illinois Ry.
Chicago & Erie R. R.
Chicago & Illinois Midland Ry.
Chicago & Western Indiana R. R.
Chicago, Detroit & Canada G. T. Jct. R. R.
Chicago, Indianapolis & Louisville Ry.
Chicago, Kalamazoo & Saginaw Ry.
Chicago, Milwaukee & St. Paul Ry.
That portion of the line extending south from Chicago, Ill.
Chicago, Peoria & St. Louis R. R.
Cincinnati, Indianapolis & Western R. R. (The)
Cincinnati, Lebanon & Northern Ry. (The)
Cincinnati Northern R. R. (The)
Cincinnati, Saginaw & Mackinaw R. R.
Cleveland, Cincinnati, Chicago & St. Louis Ry. (The)
Cooperstown & Charlotte Valley R. R.
Cornwall R. R.
Coudersport & Port Allegany R. R.
Cumberland & Pennsylvania R. R.
Cumberland Valley & Martinsburg R. R.

Dansville & Mount Morris R. R. (The)
Dayton & Union R. R.
Dayton, Toledo & Chicago Ry. (The)
Delaware & Hudson Co. (The)
Delaware & Northern R. R.
Delaware, Lackawanna & Western R. R. (The)
Delaware Valley Transportation Co.

Detroit & Huron Ry. (The)
Detroit & Mackinac Ry.
Detroit, Bay City & Western R. R.
Detroit, Grand Haven & Milwaukee Ry.
Detroit, Toledo & Ironton R. R.
Dexter & Northern R. R.

East Berlin R. R.
East Broad Top R. R. & Coal Co.
Eastern Bay Steamboat Co.
Eastern Steamship Lines, Inc.
East Jordan & Southern R. R.
Emmitsburg R. R.
Empire & South-Eastern R. R.
Erie R. R.
Erie & Michigan Ry. & Navigation Co.
Evansville & Ohio Valley Ry.
Evansville, Indianapolis & Terre Haute Ry.
Evansville Suburban & Newburgh Ry.

Fonda, Johnstown & Gloversville R. R.

Genesee & Wyoming R. R.
Grafton & Upton R. R.
Grand Rapids & Indiana Ry.
Grand Trunk Ry. of Canada.
Between International Boundary and Montreal, Quebec.
[fol.113] Grand Trunk Ry. of Canada.
Between Port Huron, Mich. and Suspension Bridge, N. Y. (For through business only.)
Grand Trunk Western Ry.
Greenbrier & Eastern R. R.
Greenwich & Johnsonville Ry.

Hagerstown & Frederick Ry. (The)
Haigis & Beaumier (Stage).
Hampton, Norfolk Packet Line.
Harrisville Southern R. R.
Hocking Valley Ry. (The)
Hudson Valley Ry.
Huntingdon & Broad Top Mountain R. R. & Coal Co. (The)

Illinois Central R. R.

All lines operated north of Cairo, Ill., Paducah, Ky., and Evansville, Ind., except lines from Chicago, Ill., west and from Minonk, Ill., north.

International Ry.
Island Transporation Co. (The)

Jamestown Street Ry.
Jamestown, Westfield & Northwestern R. R.
Jersey Shore & Antes Fort R. R.

Kalamazoo, Lake Shore & Chicago Ry.
Kanawha & Michigan Ry. (The)
Kanawha & West Virginia R. R.
Kankakee & Seneca R. R.
Keeseville, Ausable Chasm & Lake Champlain R. R.
Kennebec Central R. R.
Kishacoquillas Valley R. R.
Knox R. R.

Lake Erie & Western R. R. (The)
Lake Erie, Franklin & Clarion R. R.
Lakeside & Marblehead R. R. (The)
Lehigh & Hudson River Ry. (The)
Lehigh & New England R. R.
Lehigh Valley R. R.
Lewisburg & Ronceverte Electric Ry.
Lewiston & Auburn R. R.
Lewiston & Youngstown Frontier Ry.
Ligonier Valley R. R.
London & Port Stanley Ry. (The)
Long Fork Ry.
Long Island R. R. (The)
Lorain, Ashland & Southern R. R. (The)
Lowville & Beaver River R. R. (The)

Maine Central R. R. (Inc. S. S. Lines)
Manistee & North-Eastern R. R.
Marcellus & Otisco Company, Inc.
Marion & Eastern R. R.
Marion Ry.
Maryland & Pennsylvania Ry.
Maryland, Delaware & Virginia Ry. (Inc. S. S. Lines).
Maryland Electric Railway (The)
Michigan R. R.
Michigan Air Line Ry.
Michigan Central R. R. (The)
Middleburgh & Schoharie R. R.
Middletown & Unionville R. R.
Miller's Creek R. R.
Missouri-Illinois R. R.

That portion of the line lying east of Ste. Genevieve, Mo.

Monongahela Ry. (The)
Monson R. R.
Montour R. R.
Montpelier & Wells River R. R.
Morristown & Erie R. R.
Mount Jewett, Kinzua & Riterville R. R.

Napierville Junction Ry.
Narragansett Pier R. R.
Nelson & Albemarle Ry.
New Bedford, Marthas Vineyard & Nantucket Steamboat Co.

New Jersey & New York R. R. (The)
New Jersey, Indiana & Illinois R. R.
New Park & Fawn Grove R. R.
New York Central R. R. (The)
New York, Chicago & St. Louis R. R. (The)
New York Connecting R. R.
New York, New Haven & Hartford R. R. (The)
New York, Ontario & Western Ry.
New York, Philadelphia & Norfolk R. R.
New York, Susquehanna & Western R. R.
Norfolk & Mobjack Bay S. S. Co.
Norfolk & Washington, D. C., Steamboat Co.
Norfolk & Western Ry.
Norwood & St. Lawrence R. R.

Ohio River & Western Ry. (The)

Passamaquoddy Ferry & Navigation Co.
Pennsylvania R. R.
Pere Marquette Ry.
Philadelphia & Beach Haven R. R.
Philadelphia & Reading Ry.
Pittsburgh & Lake Erie R. R. (The)
Pittsburgh & Shawmut R. R.
Pittsburgh & West Virginia Ry. (The)
Pittsburgh, Cincinnati, Chicago & St. Louis R. R. (The)
Pittsburgh, Lisbon & Western R. R. (The)
Pittsburgh, Shawmut & Northern R. R. (The)
Point O'Woods Navigation Co.
Potato Creek R. R.
Pontiac, Oxford & Northern R. R.
Prattsburgh Ry.
Providence & New Shoreham Steamship Line.

Rahway Valley Co., Lessee.
Raquette Lake Ry.
Raritan River R. R.
Richmond, Fredericksburg & Potomac R. R.
Rural Valley R. R.
Rutland R. R.

[fol. 114] St. Johnsbury & Lake Champlain R. R.
Sandy River & Rangeley Lakes R. R.
Sandy Valley & Elkhorn Ry.
Schoharie Valley R. R.
Sewell Valley R. R.
Sharpsville R. R.
Smithfield, Newport News & Norfolk S. S. Co.
Southern New York Power & Ry. Corporation.
South Manchester R. R. (The)
Springfield Electric Ry.
Staten Island Rapid Transit Ry.

Steamer Mt. Washington,
Leander Lavalle, Capt., Between Weirs, N. H. & Center Harbor, N. H.

Stewartstown R. R.
Sullivan County R. R.
Susquehanna & New York R. R.
Susquehanna River & Western R. R. (The)

Tionesta Valley Ry.
Toledo & Ohio Central Ry.
Toledo & Western R. R. (The)
Toledo, Peoria & Western Ry.
That portion of the line east of Eureka, Ill.
Toledo, Saginaw & Muskegon Ry.
Toledo, St. Louis & Western R. R.
Toronto, Hamilton & Buffalo Ry. (The)
Tuckerton R. R. (The)

Ulster & Delaware R. R. (The)
Unadilla Valley Ry.
Union Transportation Co.
United Electric Railways.

Vermont Valley R. R.
Village of Saltaire,
Suffolk County, N. Y. (Steamer).
Virginian Ry. (The)

Wabash Ry.

That portion of the line east of St. Louis, Mo., Valley City, Ill., Meredosia, Ill., Streator, Ill., and Chicago, Ill.

Wabash, Chester & Western R. R.
Washington & Old Dominion Ry.
Washington, Baltimore & Annapolis Electric R. R.
Washington, Brandywine & Point Lookout R. R. (The)
Washington Run R. R.
Waynesburg & Washington R. R.
Western Allegheny R. R.
Western Maryland Ry.
West Jersey & Seashore R. R.
Wheeling & Lake Erie Ry. (The)
Wildwood & Delaware Bay Short Line R. R.
Wilkes-Barre & Eastern R. R.
Williamsport & North Branch Ry.
Winfield R. R.
Wiscasset, Waterville & Farmington Ry.
Woodstock Ry.
York Harbor & Beach R. R.
Zanesville & Western Ry.

Also all other carriers over which express business is transacted in the territory embraced in this group.

[fol. 115] EXHIBIT "B" TO UNIFORM CONTRACT FOR EXPRESS OPERATIONS OVER RAIL LINES

Southern Group

Aberdeen & Rockfish R. R.
Alabama & Mississippi R. R.
Alabama & Vicksburg Ry.
Alabama Great Southern R. R. (The)
Alabama Northern Ry.
Alabama Power Co.
Apalachicola Northern R. R.
Atlanta & St. Andrews Bay Ry.
Atlanta & West Point R. R.
Atlanta, Birmingham & Atlantic Ry.
Atlantic & Yadkin R. R.
Atlantic Coast Line R. R.
Atlantic, Waycross & Northern R. R.
Augusta-Aiken Ry. & Electric Corporation.
Augusta Northern Ry.

Birmingham & Northwestern Ry.
Birmingham & Southeastern Ry.
Black Mountain Ry.
Blue Ridge Ry.
Bowdon Ry.
Buffalo Union—Carolina R. R.

Cardiz R. R.
Carolina R. R.
Carolina & Northwestern Ry.
Carolina & Tennessee Sou. Ry.
Carolina & Yadkin River Ry.
Carolina, Clinchfield & Ohio Ry.
Carolina, Clinchfield & Ohio Ry. of South Carolina.
Carollton & Worthville R. R.
Central of Georgia Ry.
Charleston & Western Carolina Ry.
Charlotte Harbor & Northern Ry.
Charlotte, Monroe & Columbia R. R.
Chesapeake & Ohio Ry. (The)

Line and branches from Catlettsburg, Ky., to Elkhorn City, Ky., and line from Ashland, Ky., to Louisville, Ky.

Chesapeake Steamship Co.
Chesterfield & Lancaster R. R.
Chicago, Memphis & Gulf R. R.
Cincinnati, New Orleans & Texas Pacific Ry.
Cliffside R. R.
Columbia, Newberry & Laurens R. R.
Columbus & Greenville R. R.

Danville & Western Ry.
Delta Southern Ry.
Durham & Southern Ry.

East & West Coast Ry.
East Carolina Ry.
Elberton & Eastern Ry.

Fernwood, Columbia & Gulf R. R.
Flint River & Northeastern R. R.
Florida Central & Gulf R. R.
Florida East Coast Ry.
Frankfort & Cincinnati Ry.

Gainesville & Northwestern R. R.
Gainesville Midland Ry.
Georgia R. R.
Georgia & Florida Ry.
Georgia, Florida & Alabama Ry.
Georgia Northern Ry.
Georgia Southern & Florida Ry.
Georgia Southwestern & Gulf R. R.
Gulf & Ship Island R. R.
Gulf, Mobile & Northern R. R.
Gulf Port & Mississippi Coast Traction Co.

Hampton & Branchville R. R. & Lumber Co. (The)
Hartwell Ry.
Hawesville, Ky. Stage & Ferry Line.
Hawkinsville & Florida Southern Ry.
High Point, Randelman, Asheboro & Southern R. R.

Illinois Central R. R.

Lines south of Ohio River, Cairo, Ill., Paducah, Ky., and Evansville, Ind.

Jackson & Eastern Ry.

Kinston Carolina R. R.
Knoxville & Carolina R. R.

Lancaster & Chester Ry.
Laurinburg & Southern R. R.
Live Oak, Perry & Gulf R. R.
Loranger, Louisiana & Northeastern R. R.
Louisiana Ry. & Navigation Co.
That portion of the line between New Orleans, La., and Angola, La.
Louisiana Southern Ry.
Louisville & Nashville R. R.
Louisville & Wadley R. R.
Louisville, Henderson & St. Louis Ry.

Macon & Birmingham Ry.
Macon, Dublin & Savannah R. R.

[fol. 116] Meridian & Memphis Ry.
Mississippi Central R. R.
Muscle Shoals, Birmingham & Pensacola Ry.
Mobile & Ohio R. R.

Nashville, Chattanooga & St. Louis Ry. (The)
Natchez & Southern Ry.
Natchez, Columbia & Mobile R. R.
New Orleans & Northeastern R. R.
New Orleans Great Northern R. R.
New Orleans, Natalbany & Natchez Ry.
New Orleans, Texas & Mexico Ry.
That portion of the line between New Orleans, La., and the east bank of the Mississippi River.
Norfolk Southern R. R.
Northern Alabama Ry.
Northwestern R. R. of South Carolina.

Ocilla Southern R. R.
Ocklawaha Valley R. R.

Peninsular & Occidental S. S. Co. (The)
Piedmont & Northern Ry. (In No. Carolina).
Piedmont & Northern Ry. (In So. Carolina).

Raleigh & Charleston R. R.
Randolph & Cumberland Ry.
Rome & Northern R. R.

Sandersville R. R.
Savannah & Atlanta Ry.
Savannah & Southern Ry.
Savannah & Statesboro Ry.
Seaboard Air Line Ry.
South Georgia Ry.
Southern Railway.
Sylvania Central Ry.

Talbotton R. R.
Tallulah Falls Ry.
Tampa & Gulf Coast R. R.
Tampa & Jacksonville Ry.
Tampa Northern R. R.
Tavares & Gulf R. R.
Tennessee, Alabama & Georgia R. R.
Tennessee Central R. R.
Tuskegee R. R.

Union Point & White Plains R. R.

Virginia & Carolina Southern R. R.

Wadley Southern Ry.
Washington & Vandemere R. R.

Wellington & Powellsville R. R.
Western Ry. of Alabama (The)
Wilmington, Brunswick & Southern R. R.
Winston-Salem Southbound Ry.
Wrightsville & Tennille R. R. (The)

Yadkin R. R.
Yazoo & Mississippi Valley R. R. (The)

Also all other carriers over which express business is transacted in the territory embraced in this group.

[fol. 117] EXHIBIT "C" TO UNIFORM CONTRACT FOR EXPRESS OPERATIONS OVER RAIL LINES

Western Group

Abilene & Southern Ry.
Ahnapee & Western Ry.
Angelina & Neches River R. R.
Arkansas R. R.
Arkansas Western Ry. (The)
Asherton & Gulf Ry.
Atchison, Topeka & Santa Fe Ry. (The)

All except that portion of the line extending west from Isleta, N. M., and Belen, N. M.

Atlantic Northern Ry.
Aurora, Plainfield & Joliet Ry.

Beaumont, Sour Lake & Western Ry. (The)
Beaver, Meade & Englewood R. R.
Big Fork & International Falls Ry.
Brownwood North & South Ry.

Cape Girardeau Northern Ry.
Cassville & Exeter Ry.
Cedar Rapids & Iowa City Ry.
Central Railway of Arkansas.
Central Wisconsin Ry.
Chicago & Alton R. R. (The)
That portion of the line west of Pearl, Ill.
Chicago & North Western Ry.
Chicago, Burlington & Quincy R. R.

That portion of the line east of Dewey, So. Dak., Henry, Neb., Cheyenne, Wyo. and Denver, Colo., also the line from Denver to Lyons, Colo.

Chicago Great Western R. R.
Chicago, Milwaukee & St. Paul Ry.

All lines between Chicago, Ill., and Montline (office Marmarth), No. Dak.

Chicago, Palatine & Wauconda R. R.
Chicago, Rock Island & Gulf Ry. (The)
Chicago, Rock Island & Pacific Ry. (The)
Chicago, St. Paul, Minneapolis & Omaha Ry.
Cisco & Northeastern Ry.
Clinton & Oklahoma Western R. R. (The)
Colorado & Southern Ry. (The)
Copper Range R. R.

Dardanelle & Russellville R. R.
Dayton-Goose Creek Ry. (The)
Denison & Pacific Suburban Ry. (The)
Denver & Rio Grande Western R. R. (The)

All except that portion of the line extending west from Pueblo, Colo., and Walsenburg, Colo.

De Queen & Eastern R. R.
Des Moines & Central Iowa R. R.
Doniphan, Kensett & Searcy Ry.
Duluth & Iron Range R. R. (The)
Duluth, Missabe & Northern Ry.
Duluth, South Shore & Atlantic Ry.
Duluth, Winnipeg & Pacific Ry.

Electric Short Line Ry.
El Paso & Southwestern Co.

That portion of the line east of El Paso, Tex.

Escanaba & Lake Superior R. R.
Escanaba Power & Traction Co.

Fort Dodge, Des Moines & Southern R. R.
Ft. Smith & Western R. R.
Ft. Smith Subiaco & Rock Island R. R.
Fort Worth & Denver City Ry.
Fort Worth & Rio Grande Ry.
Franklin & Abbeville Ry. (The)
Fredericksburg & Northern Ry.

Galveston, Harrisburg & San Antonio Ry. (The)
Great Northern Ry.

That portion of the line lying east of Snowden, Mont., and Fairview, Mont., including the line between Snowden and Fairview.

Great Western Ry. (The)
Green Bay & Western R. R.
Groveton, Lufkin & Northern Ry.

Gulf & Sabine River R. R.
Gulf, Colorado & Santa Fe Ry.
Gulf, Texas & Western Ry.

Hanover Ry.
Houston & Brazos Valley Ry.
Houston & Shreveport R. R.
Houston & Texas Central R. R.
Houston, East & West Texas Ry. (The)

Iberia & Vermillion R. R.
Illinois Central R. R.

That portion of the line extending west from Chicago, Ill., and north of Minonk, Ill.

International & Great Northern Ry.
Iowa Southern Utilities Company.

Jefferson & Northwestern Ry.
Jefferson City, Mo., Wagon.
Jonesboro, Lake City & Eastern R. R.
Joplin & Pittsburg Ry.

[fol. 118] Kansas City, Clinton & Springfield Ry.
Kansas City, Mexico & Orient R. R. (The)
Kansas City, Mexico & Orient Ry. of Texas.
Kansas City Southern Ry. (The)
Kansas, Oklahoma & Gulf Ry.
Kansas, Oklahoma & Gulf Ry. of Texas.
Kewaunee, Green Bay & Western R. R.

La Crosse & Southeastern Ry.
Lake Charles & Northern R. R.
Lake Superior & Ishpeming Ry.
Leesville, Slagle & Eastern Ry.
Louisiana & Arkansas Ry.
Louisiana & North West R. R.
Louisiana Ry. & Navigation Co.

That portion of the line lying west of Angola, La., on the Mississippi River.

Louisiana Western R. R.
Lufkin, Hemphill & Gulf Ry.

Mackinac Transportation Co. (The)
Manchester & Oneida Ry.
Memphis, Dallas & Gulf R. R.
Miami Mineral Belt R. R.
Midland Continental R. R.
Midland Valley R. R.
Mineral Point & Northern Ry.

Mineral Range R. R.
Minneapolis & St. Louis R. R. (The)
Minneapolis, St. Paul & Sault Ste. Marie Ry.
Minnesota & International Ry.
Minnesota Northwestern Electric Ry.
Mississippi River & Bonne Terre Ry.
Missouri & North Arkansas R. R.
Missouri-Illinois R. R.
That portion of the line lying west of Ste. Genevieve, Mo.
Missouri, Kansas & Texas Ry.
Missouri, Kansas & Texas Ry. of Texas.
Missouri Pacific R. R.
Morgan's Louisiana & Texas R. R. & S. S. Co.
Moscow, Camden & San Augustine Ry.
Motley County Ry.
Munising, Marquette & Southeastern Ry.
Muscatine, Burlington & Southern R. R.

Nauvoo Transportation Co.
New Iberia & Northern R. R.
New Mexico Central Ry.
New Mexico Midland Ry.
New Orleans, Texas & Mexico Ry.

That portion of the line between the east bank of the Mississippi River and the Sabine River.

Northeast Oklahoma R. R.
Northern Pacific Ry.

That portion of the line lying east of Beach, N. D., and the line extending south from Beach, N. D., to Ollie, Mont.

Oil Fields Short Line R. R.
Oklahoma-Southwestern Ry.
Orange & Northwestern R. R. (The)
Osage R. R.

Panhandle & Santa Fe Ry.
Paris & Great Northern R. R.
Paris & Mount Pleasant R. R.
Pecos Valley Southern Ry. (The)
Peoria & Pekin Union Ry.
Port Bolivar Iron Ore Ry.
Prescott & Northwestern R. R.

Quanah, Acme & Pacific Ry.
Quincy, Omaha & Kansas City R. R.

Red River & Gulf R. R.
Rio Grande, El Paso & Santa Fe R. R.
Rock Island Southern Ry.

Rockport, Langdon & Northern Ry.
Roscoe, Snyder & Pacific Ry.

St. Francois County R. R.
St. Joseph & Grand Island Ry. (The)
St. Louis & Hannibal R. R.
St. Louis, Brownsville & Mexico Ry. (The)
St. Louis, El Reno & Western Ry.
St. Louis-San Francisco Ry.
St. Louis, San Francisco & Texas Ry.
St. Louis Southwestern Ry.
St. Louis Southwestern Ry. of Texas.
Salina Northern R. R.
San Antonio & Aransas Pass Ry. (The)
San Antonio Southern Ry.
San Antonio, Uvalde & Gulf R. R.
San Benito & Rio Grande Valley Ry.
Shelby County Ry.
Shelby Northwestern Ry.
Shreveport, Houston & Gulf R. R.
Sugar Land Ry.

Tabor & Northern Ry.
Tama & Toledo R. R.
Texarkana & Fort Smith Ry.
Texas City Terminal Ry.
Texas & New Orleans R. R.
Texas & Pacific Ry. (The)
Texas Mexican Ry. (The)
Texas Midland R. R.
Texas, Oklahoma & Eastern R. R.
Texas Southeastern R. R.
Thornton & Alexandria Ry.
Timpson & Henderson Ry.
Toledo, Peoria & Western Ry.

That portion of the line west of Eureka, Ill.

Tremont & Gulf Ry.
Trinity & Brazos Valley Ry. (The)
Trinity Valley Southern R. R.

Union Pacific R. R.

That portion of the line extending east from Cheyenne, Wyo., and Denver, Colo., and the line between Cheyenne, Wyo., and Denver, Colo., together with all branches and spurs connecting with the latter line, including the cut-off from Speer, Wyo., to Borie, Wyo.

[fol. 119] Vicksburg, Shreveport & Pacific Ry.

Wabash Ry.

That portion of the line lying west of Meredosia, Ill., Valley City, Ill., and St. Louis, Mo.

Warren & Ouachita Valley Ry.
Waterloo, Cedar Falls & Northern Ry.
Weatherford, Mineral Wells & Northwestern Ry.
Wichita Falls & Northwestern Ry.
Wichita Falls & Southern R. R.
Wichita Falls, Ranger & Fort Worth R. R.
Wichita Northwestern Ry.
Wichita Valley Ry. (The)
Wyoming & Missouri River R. R.

Also all other carriers over which express business is transacted in the territory embraced in this group.

[fol. 120] EXHIBIT "D" TO UNIFORM CONTRACT FOR EXPRESS OPERATIONS OVER RAIL LINES

Mountain-Pacific Group

Alaska Rivers Navigation Co.
Alaska Steamship Co.
Alaskan Engineering Commission.
Amador Central R. R. Co. (Incl. Stage Line)
American-Yukon Navigation Co.
Arcata & Mad River R. R.
Arizona Eastern R. R.
Atchison, Topeka & Santa Fe Ry. (The)

That portion of the line extending west from Isleta, N. M., and Belen, N. M.

Bamberger Electric R. R.
Beattie, J. E. Stage.
Big Pine, Cal. Stage.
Bingham & Garfield Ry.
Bishop, Cal. Stage.
Bodega, Cal. Stage.
Bullfrog Goldfield R. R.
Butte, Anaconda & Pacific Ry.

California Western R. R. & Navigation Co.
Camas Prairie R. R.
Canadian Pacific Ry. (Steamers)
Carmel, Cal. Stage.
Cement, Tolenas & Tidewater R. R.
Central California Traction Co.
Central Railroad of Oregon.
Chicago, Burlington & Quincy R. R.

That portion of the line extending west of Dewey, S. Dak. and Henry, Neb.

Chicago, Milwaukee & St. Paul Ry.

That portion of the line extending west of Montline (office, Marmarth), N. Dak.

City of Prineville Ry.
Cœur d'Alene & St. Joe Transportation Co.
Colorado & Wyoming Ry. (The)
Colorado, Wyoming & Eastern Ry.
Copper River & Northwestern Ry.
Craig Mountain Ry.

Deep Creek R. R.
Denver & Rio Grande Western R. R. (The)

That portion of the line extending west from Pueblo, Colo., and Walsenburg, Colo.

Denver & Salt Lake R. R. (The)

El Paso & Southwestern Co.

That portion west of El Paso, Tex.

Eureka Nevada Ry.

Ferndale, Cal. Stage.
Fresno Interurban Ry.

Gardnerville, Nev. Stage.
Grand Canyon Ry.
Grand River Valley Ry. (The)
Great Northern Ry.

That portion of the line extending west of Snowden, Mont., and Fairview, Mont.

Great Southern R. R.

Hartford Eastern Ry.
Hawaii Consolidated Ry., Ltd.
Hobart Mills, Cal. Stage.
Holton Inter-Urban Ry.

Independence, Cal. Stage.
Inland Empire R. R.
Inter-California Ry.
Inter-Island Steam Navigation Co., Ltd.

La Jolla Transportation Co.
Lake County Automobile Transportation Co., Inc.
Lake Tahoe Railway and Transportation Co.
Los Angeles & Salt Lake R. R.

McCloud River R. R.
Mascot & Western R. R.
Matson Navigation Co.
Monticello Steamship Co.
Myrtle Point Transportation Co.

Navy Yard Route.
Nevada-California-Oregon Ry.
Nevada Central R. R.
Nevada Copper Belt R. R.
Nevada County Narrow Gauge R. R.
Nevada Northern Ry.
Newaukum Valley R. R.
Newport Navigation Co.
Nezperce & Idaho R. R.
Northern Commercial Co.
Northern Pacific Ry.

That portion of the line extending west of Beach, No. Dak., not including the line from Beach, N. D., to Ollie, Mont.
Northwestern Pacific R. R.

[fol. 121] Oahu Ry. & Land Co.
Ocean Beach, Cal. Stage.
Oceanic Steamship Co.
Oregon Electric Ry.
Oregon Short Line R. R.
Oregon Trunk Ry.
Oregon-Washington R. R. & Navigation Co.

Pacific & Idaho Northern Ry.
Pacific Coast R. R.
Pacific Coast Ry.
Pacific Electric Ry.
Pacific Mail Steamship Co.
Pacific Steamship Co.
Pajaro Valley Consolidated R. R.
Peninsular Ry.
Phœnix Ry. of Arizona.
Portland Ry., Light and Power Co.
Port Townsend & Puget Sound Ry.
Puget Sound Navigation Co.

Quincy R. R.

Randsburg, Cal. Stage.
Ray & Gila Valley R. R.
Ray Transfer Co.
Redding-Weaverville, Cal. Stage.
Rio Grande Southern R. R. (The)

Sacramento Northern R. R.
Sacramento Valley & Eastern Ry.

Salt Lake & Utah R. R.
San Diego & Arizona Ry.
San Francisco, Napa & Calistoga Ry.
San Francisco-Sacramento R. R.
San Joaquin & Eastern R. R.
San Juan, Cal. Pacific Stage.
San Luis Southern Ry.
San Quentin, Cal. Stage.
Scio, Ore. Stage.
Sierra Ry. of California.
Southern Pacific Company-Pacific System.
Spokane and Eastern Ry. and Power Co.
Spokane International Ry.
Spokane, Portland & Seattle Ry.
Stayton, Ore. Stage.
Sumpter Valley Ry.
Sunset R. R.

Tidewater Southern Ry.
Tonopah & Goldfield R. R.
Tonopah & Tidewater R. R.
Tooele Valley Ry.
Trona Ry.
Tucson,Cornelia & Gila Bend R. R.

Uintah Ry. (The)
Union Pacific R. R.

That portion of the line extending west from Cheyenne, Wyo.

United Railways Co.
Utah-Idaho Central R. R.
Utah Ry.

Valley & Siletz R. R.
Virginia & Truckee Ry.
Visalia Electric R. R.

Walla Walla Valley Ry.
Washington, Idaho & Montana Ry.
Waterville Ry.
Western Pacific R. R. (The)
White, Carl (Stage)
White Pass & Yukon Route.
White Sulphur Springs & Yellowstone Park Ry.
Willamette Valley & Coast R. R.
Willamette Valley Southern Ry.

Yosemite Valley R. R.
Yreka R. R.

Also all other carriers over which express business is transacted in the territory embraced in this group.

[fol. 122] IN UNITED STATES DISTRICT COURT

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed Aug. 31, 1923

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, I hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, and of myself as its counsel, in the above-entitled suit.

P. J. Farrell, For Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 123] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefits and advantage of exception to the many errors and insufficiencies in the complainant's bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

Answering paragraphs 1 to 5, inclusive, of the bill of complaint, said intervening defendant, Interstate Commerce Commission, hereinafter called the Commission, admits, for the purposes of this suit, that the allegations contained in said paragraphs are true, except [fol. 124] that the commission denies that complainant is a carrier by railroad within the meaning of paragraph (4) of section 15 of the Interstate Commerce act.

Answering paragraph 6 of the bill of complaint, the Commission admits that the allegations contained therein are true, except that the Commission denies that it was essential to the transportation of the interstate express traffic, in order to avoid either circuity of routing or delay in delivery, that complainant should proceed in the manner described in said paragraph.

Answering paragraph 7 of the bill of complaint, the Commission admits that the allegations contained therein are true.

Answering paragraphs 8 to 23, inclusive, of the bill of complaint, the Commission admits and alleges that it made and entered the report dated March 12, 1923, the supplemental report dated July 9, 1923, and the order dated July 9, 1923, referred to in said paragraphs, which are Exhibits 1, 3, and 4 to the bill of complaint, in

two proceedings then pending before it, in one of which the Southeastern Express Co., was complainant and complainant herein was defendant, and in the other of which the Southern Fisheries Association was complainant and complainant herein and said Southeastern Express Co. were defendants, under the authority conferred upon the Commission by said act, particularly paragraph (3) of section 15 thereof.

[fol. 125] The Commission further alleges that the complaints filed in its office in said proceedings were duly served upon the defendants named therein; that subsequent to such services the Commission accorded to the parties to said proceedings the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order of July 9, was submitted to the Commission for consideration, on behalf of the parties to said proceedings, by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and served upon complainant herein, and upon said Southeastern Express Co., said report of March 12 and said supplemental report and order of July 9, which included the Commission's decision, conclusions, order and requirements in the premises; that upon the evidence aforesaid, and as shown in and by said report of March 12, and said supplemental report of July 9, the Commission made the findings and stated the conclusions, upon which said order is based. In this connection, among other things, the Commission said:

We are of the opinion and find that it is necessary and desirable in the public interest that through routes and joint rates applicable [fol. 126] thereto be established between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, and New York, N. Y., and all points on the direct routes of the American Railway Express Co. between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Co. from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Co. and the Southeastern Express Co. at Washington, D. C.

We further find that the rates contemporaneously applicable between the above-named points over routes now used are and for the future will be just and reasonable rates for application over the routes herein prescribed.

We further find that the tariffs should provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herin prescribed.

(Bill of complaint 61.)

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully sup-

ported and justified by the evidence submitted to the Commission in said proceedings as aforesaid.

The Commission further alleges that, in making said report of March 12, and said supplemental report and order of July 9, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respec-[fol. 127] tive counsel, including all matters covered by the allegations of the bill of complaint herein, particularly the allegations contained in paragraph 22 of the bill of complaint.

The Commission further alleges that said order of July 9 was not made or entered either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint.

The commission particularly denies that said order of July 9 deprives complainant of its property without due process of law, in violation of the fifth amendment, or of any other portion, of the Constitution of the United States.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said bill of complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report of March 12, or said supplemental report and order of July 9, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, by P. J. Farrell, Chief Counsel.

[fol. 128] Jurat showing the foregoing was duly sworn to by Joseph B. Eastman omitted in printing.

[fol. 129] IN UNITED STATES DISTRICT COURT

APPEARANCE OF CLINT W. HAGER, UNITED STATES ATTORNEY—Filed September 12, 1923

And now comes the United States of America in the above stated case, by Clint W. Hager, United States Attorney for said District, and by leave of the Court, first had and obtained, adopts the answer of the Interstate Commerce Commission, intervening defendant in said case, and relies on each and every response therein to plaintiff's bill as its own, as well as upon each and every allegation of said answer.

All of which matters and things the United States is ready to aver, maintain and prove, as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

The United States of America, by Clint W. Hager, United States Attorney.

[File endorsement omitted.]

[fol. 130] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

INTERVENTION OF THE SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU, AND SOUTHERN FISHERIES ASSOCIATION—Filed September 12, 1923

Come now the Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, and respectfully show unto the Court as follows:

I. The Southern Traffic League is a non-stock corporation organized and existing under the laws of the State of Georgia, having its office in Fulton County in said State. The membership of the Southern Traffic League embraces more than two hundred persons, firms, corporations and associations doing business in the Southern States and in the course thereof many of such members employ the transportation facilities of the American Railway Express Company and the Southern Express Company as well as the various railroads and other transportation agencies in the Southern States. As such the members of the Southern Traffic League have an interest in this proceeding proper to be asserted by the Southern Traffic League by virtue of its charter. Moreover, before the Interstate Commerce Commission, the Southern Traffic League was an intervening party to the proceeding.

The Atlanta Freight Bureau is a non-stock corporation organized and existing under the laws of Georgia, having its principal office in Fulton County, in said State. The membership of the Atlanta Freight Bureau embraces approximately two hundred fifty persons, firms, and corporations having offices and doing business in the City [fol. 131] of Atlanta, in the course of which many of such members employ the facilities of the American Railway Express Company and the Southeastern Express Company as well as the various railroads and other transportation agencies available to shippers in Atlanta. As such the members of the Atlanta Freight Bureau have an interest in this proceeding proper to be asserted by the Atlanta Freight Bureau by virtue of its charter. Moreover, before the Interstate Commerce Commission, the Atlanta Freight Bureau was an intervening party to the proceedings.

The Southern Fisheries Association is a voluntary organization embracing in its membership approximately one hundred producers and distributors of fresh fish and other sea foods. Three of the members of such association reside in Atlanta, Georgia, but most of the members of such association reside in Florida. The Southern Fisheries Association has no office in the State of Georgia, the residence of the President of such association being Pensacola, Florida, and the other officers likewise residing in Florida.

In the course of their business virtually all the members of the Southern Fisheries Association employ the facilities of the American Railway Express Company and the Southeastern Express Company, and they are therefore interested in this proceeding. Moreover, before the Interstate Commerce Commission, the Southern Fisheries Association filed its formal complaint against the American Railway Express Company and the Southeastern Express Company, involving substantially the same issues and questions as were involved in the complaint of the Southeastern Express Company against the American Railway Express Company. In the proceedings before the Interstate Commerce Commission the complaint of the Southern Fisheries Association was consolidated by the Commission with that of the Southeastern Express Company and thereafter said Southern Fisheries Association was treated by the Commission as an intervenor in the complaint instituted by the Southeastern Express Company. [fol. 132] The order of the Commission herein sought to be enjoined was made in the consolidated cases brought by the Southern Fisheries Association and the Southeastern Express Company as exhibited by the bill of complaint herein, page 63 thereof.

It is therefore shown unto the Court that under the statute in such cases the Southern Traffic League, the Atlanta Freight Bureau and the Southern Fisheries Association, are, as of right, entitled to intervene in this proceeding and, praying leave of the court that their intervention may be allowed, ordered filed and considered, and, now and at all times hereafter saving and reserving to themselves all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's bill of complaint contained, for answer thereunto, or unto so much thereof or such parts thereof as they are advised that it is material for them to answer, answer and say:

II. These intervenors adopt as their own, the same as if set forth herein, the answers of the United States, defendant herein, and of the Interstate Commerce Commission and the Southeastern Express Company, intervenors herein.

III. In addition thereto these intervenors further show unto the Court that by Act of Congress February 28th, 1920, (known as the Transportation Act, 1920) the authority of the Interstate Commerce Commission over express companies and railroads engaged in interstate commerce was enlarged in the following language:

"And it (the Commission) shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon

complaint or upon its own initiative, without complaint, established through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, and the divisions of such rates, fares, or changes as hereinafter provided, and [fol. 133] the terms and conditions under which such through routes shall be operated."

Pursuant to such statute the Southern Fisheries Association, by formal complaint against the American Railway Express Company and the Southeastern Express Company, and the Southern Traffic League and Atlanta Freight Bureau, by intervention in the complaint of the Southeastern Express Company, averred and at the public hearings held by and before the Interstate Commerce Commission, submitted evidence designed to show and showing that it was necessary and desirable in the public interest that the Commission should order the establishment of reasonable joint through routes and rates between the American Railway Express Company and the Southeastern Express Company irrespective of the fact that there might be already in existence between points of origin and destination reasonable routes formed exclusively by the Southeastern Express Company or formed exclusively by the American Railway Express Company; that in such evidence it was shown unto the Commission that the establishment of such additional reasonable joint through routes between the two express companies was necessary and desirable in the public interest because of the greater quantity of service to the public thereby rendered available; because of the superiority of such additional service in many if not in most instances measured by the time of transit, the care exercised in transportation, the regularity and continuity of service, the nature of the facilities furnished including equipment, convenience of location of receiving and delivering offices of the respective companies, the advantages of favorable rules and regulations, and because of the public interest and the special interest of the members of these intervening organizations in the preservation of fair competition between common carriers by express.

Pursuant to the evidence described as well as the evidence submitted by the American Railway Express Company and the Southeastern Express Company the Commission did, in its opinions and orders described in the bill of complaint, determine upon and [fol. 134] direct that in the public interest it was necessary that there be established reasonable joint through routes between the Southeastern and American Railway Express companies irrespective of the fact that there might already be in existence reasonable routes formed exclusively by the American or exclusively by the Southeastern companies.

These intervenors respectfully show that such findings and orders of the Interstate Commerce Commission are administrative in character, based upon substantial evidence, made after a full public hearing and investigation, and within the terms of the Transportation Act, 1920, enacted by Congress February 28th, 1920. As a consequence these intervenors respectfully submit that such findings and

order of the Commission are not arbitrary or otherwise unreasonable or subject to review by this Honorable Court and that the bill of complaint does not allege or charge that such order was made without substantial evidence to support it, and, therefore, said order and the findings and conclusions of the Commission contained in its reports accompanying and made a part of said order are conclusive and not subject to judicial review.

IV. These intervenors further show unto the Court that the findings and conclusions that the joint through routes ordered to be established as necessary and desirable in the public interest were made by the Commission, in the discharge of its administrative functions and in the exercise of the discretion vested in it by Congress, after full hearing, and after analyzing and considering all of the facts and evidence produced at such hearing by all parties; that said findings and conclusions of the Commission and said order are amply supported by the evidence in the record before the Commission and that the conclusions and findings of the Commission with respect to the desirability and necessity for the additional joint routes ordered established, and with respect to the reasonableness and practicability of said routes should therefore be treated as binding and conclusive [fol. 135] and not subject to judicial inquiry or review.

It is averred by these intervenors that the mere existence of one reasonable route between a given point of origin and destination does not preclude the conclusion that it may be necessary and desirable in the public interest that additional joint through routes, reasonable in character, shall be established between the same point of origin and destination; and that the question as to what is necessary to adequately subserve the public interest, as well as the question of whether such additional routes are necessary or desirable in the public interest, are matters confided exclusively to the jurisdiction of the Interstate Commerce Commission, and with respect to which the findings and conclusions made by the Commission after full hearing and investigation upon an ample record should be respected and treated as final and conclusive.

V. These intervenors expressly deny that either the American Railway Express Company or the Southeastern Express Company have any property right in the retention of traffic once obtained by either of them at a point of origin regardless of the public interest making it necessary or desirable that such traffic shall be turned over by the originating company to the other at an intermediate point so as to form a reasonable through route composed of the services of both companies. Each of such express companies is engaged in interstate commerce and is subject to the regulation of Congress. Other than the right to receive adequate compensation for the service which it renders neither company possesses under the 5th Amendment to the Constitution of the United States any immunity against such regulations by Congress as are deemed by it to be in the public interest. And since, in the exercise of such power, Congress has delegated to the Interstate Commerce Commission the

authority to determine, in individual instances, whether the facts warrant the establishment of joint through routes because of their necessity or desirability in the public interest, neither the Act of Congress, nor the exercise of such authority by the Commission [fol. 136] contravenes the 5th Amendment to the Constitution of the United States as alleged in the bill of complaint.

VI. It is further shown unto the court that in Section 5 of the Interstate Commerce Act, as amended by Congress February 28th, 1920, it is rendered unlawful for any common carrier by railroad or otherwise to make with another any contract or agreement for the pooling of traffic or the division of earnings therefrom except that upon application to the Interstate Commerce Commission such tribunal may permit to and prescribe the extent to which such pooling and division of earnings may be permitted if it is found by the Commission that such pooling and division of earnings "will be in the interest of better service to the public." In such amended Section 5 of the Interstate Commerce Act it is further provided that no common carrier shall acquire control of any other common carrier by lease or otherwise except that such control and consolidation may be permitted by the Interstate Commerce Commission when found by it to be "in the public interest" and the Commission is empowered to permit such control and consolidation under such terms and conditions as shall be found reasonable by the Commission, it being further within the *peer* of the Commission to make from time to time such supplemental orders as it may deem necessary or appropriate. Such provisions of Section 5 are then in terms made applicable to the consolidation of four express companies into the American Railway Express Company upon application to the Interstate Commerce Commission.

It is shown unto the Court that, as will appear from the decision and report of the Interstate Commerce Commission entitled Consolidation of Express Companies, 59 I. C. C. 459, within thirty days subsequent to February 28th, 1920, four express companies did make, to the Interstate Commerce Commission, application for authority to consolidate their operations into the American Railway Express Company; thereupon, after due hearing and investigation, it was determined and ordered by the Interstate Commerce Commis- [fol. 137] sion that such consolidation would be "in the public interest" and authority was extended to the American Railway Express Company to operate as a consolidated company, subject to such supplemental order or orders as might be made by the Commission as permitted by the Statute.

Thereupon it was proposed by the American Railway Express Company and most of the railroad common carriers in the United States to enter into a standard form of express traffic and a division of earnings thereunder. Pursuant to law, there was then made to the Interstate Commerce Commission application for approval of such pooling contract; whereupon, after due hearing and investigation, it was concluded and ordered by the Interstate Commerce

Commission that such pooling of traffic and division of net earnings would be "in the interest of better service to the public" and induce economy of operation, and such pooling contract and division of net earnings was approved, subject to the statutory right of the Commission to make such supplemental orders as to it might seem necessary or appropriate. All of which will more fully appear from the decision and report of the Interstate Commerce Commission entitled Express Contract 1920, Ex Parte 76, 59 I. C. C. 518.

These intervenors respectfully show unto the Court that the very existence of the American Railway Express Company as a consolidated corporation and its right to operate under the uniform express contract above described flow from the exercise of authority by the Interstate Commerce Commission to determine whether such consolidation and the pooling of traffic and earnings from express business are in the public interest; that under the statute it is within the authority of the Commission to make such supplemental orders as to it seems necessary and appropriate to carry out its purposes in extending authority to consolidate and to pool traffic and earnings; that in the exercise of such authority it is permissible for the Interstate Commerce Commission to determine whether or not to permit the continuation of a virtual monopoly of the express business by the American Railway Express Company or whether to compel it so to conduct its business as not to restrain or stifle competition and on [fol. 138] such terms and subject to such conditions as shall be deemed by the Commission to be in the public interest.

Intervenors aver that in ordering certain through routes and joint rates to be provided and maintained by the two express companies, the Interstate Commerce Commission was acting in the exercise of powers expressly conferred upon it by Section 15 of the Interstate Commerce Act, as amended February 28th, 1920, with respect to the establishment of joint through rates and routes whenever it deemed the same to be necessary or desirable in the public interest, independently of that plenary power, but under the circumstances of this case it was peculiarly its duty to safeguard and protect the rights and interest of the public to the end that the said American Railway Express Company should not be permitted to use its uniform contract and the pooling arrangement therein provided for, and its consolidation of express routes secured thereby, for the purpose of stifling competition and unduly restraining the same and depriving the public of the use of the joint through routes and rates ordered established.

It is respectfully submitted, therefore, that the order of the Interstate Commerce Commission, herein sought to be enjoined, derives additional sanction and authority from the American Railway Express Company, having accepted the benefits of the statute, cannot be heard to question the authority of the Interstate Commerce Commission to impose such additional rules and regulations as are deemed by it necessary and appropriate in the manner pointed out by the Commission in the opinion accompanying the order herein sought to be enjoined.

Wherefore, these intervenors respectfully pray that the bill of complaint may be dismissed.

Southern Traffic League, by T. M. Henderson, President.
[fol. 139] Atlanta Freight Bureau, by H. T. Moore, Secretary.
Southern Fisheries Association, by F. W. Welles, President.
Chas. E. Cotterill, Attorney for Intervenors, 525 Grant Bldg., Atlanta.

Jurat showing the foregoing was duly sworn to by W. S. Creighton omitted in printing.

[fol. 140] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

ORDER ALLOWING INTERVENTION OF SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU AND SOUTHERN FISHERIES ASSOCIATION

It appearing to the court that Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association are interested in sustaining and upholding the order of the Interstate Commerce Commission attacked and sought to be enjoined by the complainant in the cause, the American Railway Express Company; and

It further appearing that said Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association have the statutory right to intervene in the cause, and it having presented to the Court an intervention which embodies an answer to the bill of complaint:

It is therefore ordered that said intervention be allowed, said answer be filed, and that said Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association be made parties defendant in the case.

Sept. 12, 1923.

Sam'l H. Sibley, U. S. Judge.

[fol. 141] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

INTERVENTION OF SOUTHEASTERN EXPRESS COMPANY

The Southeastern Express Company, a corporation created and existing under the laws of Alabama, and a citizen, resident and inhabitant of said State of Alabama, being interested in sustaining and

upholding the order of the Interstate Commerce Commission which is sought to be enjoined, annulled and set aside by the complainant in the above cause, in exercise of its statutory right intervenes herein and praying leave of the Court that its intervention may be allowed, ordered filed and considered, answer the bill of complaint as follows:

1st. Answering the first paragraph of said bill of complaint, complainant's allegation as to its corporate organization is admitted. It is also admitted that complainant is engaged in the transportation of property by express as alleged, though from insufficient information it can neither be admitted nor denied by intervenor as to whether the extent of complainant's operations over rail lines in the territory lying south of the Ohio and Potomac Rivers and east [fol. 142] of the Mississippi River is correctly stated. It is admitted that complainant's lines extend into and throughout the New England States and the State of New York as well as throughout each of the other States of the Union. With respect to the allegation that complainant's organization was approved by the Interstate Commerce Commission on the date named in pursuance of the authority conferred upon the Commission by certain provisions of the Transportation Act of 1920 amending the Interstate Commerce Act, the same is admitted if complainant means by the approval of its organization that the Interstate Commerce Commission did on the 7th day of December, 1920, approve, and authorize the consolidation of the express transportation business and properties of certain express companies into the American Railway Express Company, but it is respectfully submitted that the Interstate Commerce Commission has never approved the complainant's organization as such.

2nd. Paragraph two of the complaint is admitted.

3rd. Answering paragraph three, this intervenor admits that it filed its complaint before the Interstate Commerce Commission against the American Railway Express Company; it admits that it was and is a corporation under the laws of the State of Alabama, and while further admitting that the executive and corporate offices and headquarters, and the office of its President and General Manager, and its managerial headquarters are located in the City of Atlanta, County of Fulton, and in the Northern District of Georgia, it expressly denies that it is a citizen of the State of Georgia, and that it is a resident and inhabitant of the Northern District thereof.

The allegation contained in paragraph three with respect to the action of the Southern Fisheries Association in filing a petition against complainant is admitted, and that the same character of relief sought by intervenor in its complaint was in a general way sought [fol. 143] by the Southern Fisheries Association in its original petition. It is further admitted that the petition of the Southern Fisheries Association was consolidated with the complaint of intervenor; intervenor, however, denies that the Southern Fisheries Association became a party to the petition upon which the order complained of was granted in a full and absolute sense; as a matter of fact, its status became that of an intervenor in the case made by the Southeastern

Express Company's complaint when its petition was consolidated with the complaint of the Southeastern Express Company. From insufficient information intervenor can neither admit nor deny the allegation that the Southern Fisheries Association (which it does admit to be a voluntary association) has individual members who are residents and citizens of Fulton County, Georgia, and of the Northern District thereof. Intervenor avers that the headquarters and operations of said Southern Fisheries Association are out-side of the Northern District of Georgia, and it expressly denies the implication of complainant that the residence of certain individual members of the Southern Fisheries Association in the Northern District of Georgia would give the Association itself residence in said district. Intervenor admits the further allegations respecting the intervention of the Atlanta Traffic Bureau and the Southern Traffic League, and admits the allegations as to the residence of the said two intervenors. It expressly denies, however, that said intervenors were parties to the petition of Southeastern Express Company in such substantial sense as under the terms and meaning of the relevant provisions of the Urgent Deficiency Appropriation Act of October 22nd, 1913, would give the district of their residence venue in a proceeding brought to annul and set aside the order herein attacked and sought to be enjoined, and as a consequence jurisdiction to this Honorable Court.

The further allegations of paragraph three with respect to the date upon which this intervenor began the transportation of property by express in interstate, intrastate and foreign commerce, and with respect to the lines over which it operates and the location of said lines are admitted.

[fol. 144] 4th. In answer to paragraph four of the complaint, this intervenor admits that complainant operates over all the railroads in the southeastern section of the United States other than those over which it operates, and further admits that its operations are under what is known as "The Uniform Contract for Express Operation Over Railroad Lines." It admits the further allegations with respect to the railroads of the United States which entered into such contract with complainant (including the Seaboard Air Line Railway), and it also admits that Southern Railway Company System lines refused to enter into such contract with complainant, and that said Southern Railway System lines upon such refusal were instrumental in organizing Southeastern Express Company. It further admits that the complainant operated over Southern Railway Company System lines until May 1st, 1921, when this intervenor took over and began operations thereon.

This intervenor from insufficient information can neither admit nor deny the allegations of paragraph four of the complaint regarding arrangements made by complainant with the Seaboard Air Line Railway for transportation for express matter between Washington, D. C. and Atlanta, Georgia, Birmingham, Alabama, and other points in the territory contiguous thereto. Intervenor admits that the Seaboard Air Line Railway does run certain special trains for the transportation of express matter entrusted to complainant.

Intervenor avers, however, that its service over the lines of Southern Railway Company from Washington, D. C. to the points named and the territory contiguous thereto is more frequent, certain and expeditious than that of the complainant over the lines of the Seaboard Air Line Railway, and that ample proof to this effect was before the Interstate Commerce Commission upon the hearing on intervenor's complaint, and that the record of the Interstate Commerce Commission in the case (Docket No. 12784) fully sustain the findings made by that body to the effect that the public interest and con- [fol. 145] venience require that through routes be maintained between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut and New York, N. Y. and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C. on the one hand, and all points on the main line of the Southern Railway Company from Washington to and including Birmingham, Alabama, on the other, with transfer between complainant and this intervenor at Washington, D. C.

Answering the further allegations in paragraph four of the bill of complaint, this intervenor admits that if the order of the Commission complained of becomes effective and shippers exercise the right to route via Southeastern Express Company at Washington, as they are allowed to do under the order in question, the effect may be to divert business from the Seaboard Air Line Railway to the Southern Railway Company. Intervenor, from lack of information, can neither admit nor deny the further allegations in effect that such diversion will be to the great detriment of the Seaboard Air Line Railway. Whether the diversion of business at Washington from that Company will be to its detriment depends upon the cost to it of the service and the revenue which it derives from the express business done by the complainant over its lines, but intervenor avers that even if it be to the detriment of Seaboard Air Line Railway, as well as to the detriment of complainant and to other railroads over whose lines such complainant operates, this fact furnishes no reason why the public should be deprived of expeditious and satisfactory express service over the lines of Southern Railway Company to and from Washington, nor does it furnish any reason why there should not be competition in express service south of Washington both between the Seaboard Air Line Railway and Southern Railway Company and between complainant and this intervenor. Especially as the Commission has found that it is necessary and desirable in the public interest that the through routes and joint rates contemplated by its order attached in this proceeding should be established and opened to use by the public.

[fol. 146] 5. Answering paragraph five, this intervenor admits the correctness of the quotation contained in said paragraph from the complaint of intervenor before the Interstate Commerce Commission. Intervenor admits the allegations that the complainant is a common carrier express company engaged in the transportation of property by express in interstate and foreign commerce, wholly by railroad,

and partly by railroad and partly by water. The physical transportation or actual movement, however, as intervenor avers, where over lines of railroad, is actually performed by the railroads owning or operating such lines and under contract with complainant, but intervenor denies, however, that complainant either owns or operates lines of railroad and denies the allegation which complainant makes and the conclusion which it seeks to draw, that it is a carrier by railroad within the meaning and purview of Paragraph 4 of Section 15 of the Interstate Commerce Act. This intervenor expressly avers that the fact that complainant's business is transported over lines of railroad by virtue of contracts which it has with railroads does not make it a carrier by railroad in the sense in which such term is used in the Interstate Commerce Act or in the sense in which such term is generally understood. The term "carrier by railroad" as used in such provisions of the Interstate Commerce Act, as to the construction of which there were and are conflicting contentions between complainant and intervenor, has reference to the proprietor or owner and operator of a line of railroad and does not embrace an express company which contracts with a railroad for transportation of shipments by express over such railroad.

6. Answering paragraph six of the bill of complaint, intervenor admits that prior to May 1st, 1921, the complainant had duly posted at several stations, as required by law, schedules of rates applicable to and governing its charges for interstate and foreign transportation of property by express. Intervenor further avers that the tariffs [fol. 147] of complainant prior to May 1st, 1921, left open all routes and the application of through rates between all points. It asserts that this is true because the express companies which operated prior to their consolidation into the American Railway Express Company had failed to establish and publish specific routes, and it further avers that complainant had also failed to establish and publish in tariff form specific routes. Intervenor admits that in the month of April, 1921, it filed its concurrence in the express rates, schedules and supplements thereto which had been issued and filed by complainant insofar as such schedules contained rates applying to local or joint transportation between points on the lines of intervenor, and to and from points on said lines, from and to all points in the United States and Canada on the lines of complainant and all other express companies which were parties to said tariffs. Intervenor admits that its purpose in filing such concurrence was to make it a party to all the tariffs and schedules issued by complainant. It denies, however, that its purpose was "to open all routes without regard to circuity of routing or delay in handling of the traffic which would be caused thereby." The failure of complainant to establish and publish specific routes had the effect of opening all routes, whether direct or circuitous, and the concurrence of this intervenor did not affect the situation which had already been created, and, furthermore, such concurrence, even if made effective, would not have opened any routes which did not already exist under the tariffs of the complainant on file at the time intervenor concurred therein. It

would merely have made intervenor a party to the rates already applicable to existing routes. Intervenor admits that its concurrence was without regard to the so-called rights of complainant to long hauls. It avers that under the system of through rates which had previously been established by the Interstate Commerce Commission and which became effective in the year 1914, claims of individual express companies to long hauls were disregarded, and the express companies, under said system of rates, were treated as a unit. An integral part of the plan of the Commission was to disregard the separate entities of independent express companies insofar as the claim to long hauls by them might interfere with the working of the [fol. 148] system which the Commission devised, and it was also a part of the Commission's plan to correct hardships and to compensate for sacrifices which might arise between express companies participating in joint handling of express transportation through a just and equitable fixation of the bases for dividing the revenue arising from such joint handling, the power being in the Commission to prescribe the divisions in all cases where the express companies themselves might fail to agree thereon. Intervenor further avers that the Commission in its supplemental report of July 9th, 1923, made a part of the order herein attacked and sought to be enjoined and set aside, significantly calls attention to the fact that "the question of divisions over joint routes still remains for determination," and in this connection intervenor avers that complainant and intervenor, by stipulation of record in the case before the Interstate Commerce Commission, agreed that the question of divisions should be held in abeyance and not be submitted to the Commission for determination until the main controversy, upon which the complaint of intervenor was based, should be decided.

With respect to the allegation in paragraph six as follows, "Concurrence by your Orator in such filing by the Southeastern Express Company would have left no restriction upon circuitous routing of express shipments in the large territory involved." This intervenor says that formal concurrence on the part of the complainant was entirely unnecessary, and it repeats that the concurrence of the Southeastern Express Company did not open up any routes which did not exist prior to such concurrence. Intervenor admits that there were no restrictions upon routes, circuitous or otherwise, but it insists upon its allegation that its concurrence in the complainant's tariffs did not create such situation.

Intervenor admits the allegation that after its concurrence in the tariffs of the complainant, the latter filed a special supplement limiting the application of such tariffs, but it expressly denies that complainant in doing so attempted either to prevent circuitous routing or to preserve its long hauls only in cases where it was practicable [fol. 149] to do so without causing unreasonable circuity or undue delay in the handling of traffic. Intervenor avers that, as found by the Commission in its report, by the restrictions placed in its tariffs by the complainant which became effective May 1st, 1921, it limited the use of through routes and the application of joint through rates

to the exclusive offices of the two express companies. It further avers that complainant by such restrictions, as found by the Commission, closed numbers of expeditious routes which had formerly existed, and which had been used preferentially by complainant when the latter had the choice of all routes, including the very routes which the order attacked in this cause requires to be opened to the public. The evidence in the record and the findings made in the case before the Interstate Commerce Commission overwhelmingly refute the claim of the complainant that its purpose in placing the restrictions in its tariffs and in limiting the application of through rates and joint handling to the exclusive offices of the two companies, was to avoid circuitous routing of express shipments. But whatever may have been complainant's purpose in originally placing such restrictions in its tariffs, the Commission has now found and held that the public necessity and convenience require that said restrictions be removed, has ordered them to be removed from the tariffs and the joint routes specified in its order kept open and available to the public under the system of express rates prescribed by the Commission, and intervenor avers that such findings and order are binding and conclusive.

Intervenor admits that it protested against the allowance of complainant's special supplement, and further admits that notwithstanding its protest, the Commission allowed it to go into effect, and only after long and full hearing and painstaking investigation decided that the restrictions in said special supplement should be removed.

Admitting that subsequent to its special supplement complainant established a certain number of joint routes with intervenor for use in both interstate and intrastate commerce, it is expressly denied that [fol. 150] a large number of joint routes were established. As a matter of fact, according to the Commission's report and findings in this case, considering the number of direct through routes which the complainant closed, and which had theretofore been used and which the Commission expressly finds are necessary and desirable in the public interest, the number which it subsequently opened was relatively few. This intervenor expressly denies the allegation that routes have been established from time to time as the movement of traffic developed the necessity therefor. Such allegation is directly contrary to the express findings of the Commission in that the Commission has specifically found and held that the public interest demands the opening of numerous additional routes which complainant, by the restrictions in its tariffs, sought and still seeks to deny to the public.

All other allegations in paragraph six are denied, except the allegation that the routes established by complainant subsequent to the restrictions placed in its tariffs were found by the Commission to cause traffic to move over the most direct lines between points on such routes, which allegation intervenor admits, but it repeats its former allegation that such joint routes, voluntarily established, are limited in number and are between comparatively few points as the Commission has found.

7th. Answering paragraph seven of the complaint, this intervenor admits that the same contains a correct quotation from its petition to the Commisison. It submits, however, that a prayer to the Commission to require "that all available routes be kept open" is not susceptible to the construction that it sought thereby to keep all possible routes open. Intervenor expressly denies the implication made that its concurrence in the tariffs of the complainant opened all possible routes, and it again repeats its averment that its concurrence did not affect the question of what routes were or were not open, but, upon the other hand, it again asserts that complainant's tariffs themselves by reason of the fact that no specific routes were published in tariff form operated to keep open all routes without regard to inter- [fol. 151] venor's concurrence, and it repeats its denial that its concurrence made it necessary for the complainant to take the position which it did and to close many reasonable and direct routes theretofore preferentially used by complainant and which the Commission now finds should be opened and has ordered accordingly.

8. In answer to paragraph eight of the complaint, intervenor admits the statement therein made as to the proceedings before the Examiner of the Interstate Commerce Commission, and before the Commission itself. It admits that subsequent to the original report of the Commission, which is correctly set forth by complainant as Exhibit 1 to its bill, a conference between representatives of intervenor and representatives of complainant was held in Washington, and it admits the allegations as to the joint report made to the Commission of the proceedings had at such conference, such report being set forth in Exhibit Number 2 to the bill; intervenor, however, denies the allegation that complainant was willing and offered in said conference to surrender substantial rights in order that an agreement might be reached, and intervenor asserts that nothing was required of the complainant by said report of the Commission except that which it was obligated to concede in order to serve the public interest and convenience, and intervenor further avers that at said conference it demanded that complainant should do nothing beyond what the findings made by the Commission in said report required. Intervenor admits that at the conference in question it insisted that the complainant should establish, in conjunction with it, through routes from many points of origin to many points of destination, despite the fact that complainant may have had reasonable single line routes between such points. Intervenor denies that such routes of the complainant were and are satisfactory to the public, and reference to the record and evidence taken before the Commission [fol. 152] will demonstrate that complainant was not rendering reasonable and satisfactory service over such routes, and that the public interest demanded (as expressly found by the Commission) the establishment of additional joint through competitive routes in order that proper and satisfactory express service should be furnished to the public.

Intervenor further denies the allegation contained in paragraph eight that it demanded the establishment of any joint routes which

would require complainant to short haul itself without benefit to the public. It submits that the Interstate Commerce Commission determined in its report what the public interest demanded, that the conclusions and findings of the Commission in this regard are final and binding, and that since the original report of the Commission this intervenor has knowingly asked and demanded the establishment of no joint routes which are not entirely in accordance with the letter and spirit of the Commission's report. Intervenor, following the suggestion of the Commission, has undertaken to compile routing guides with the purpose of listing therein only reasonable direct through and single line routes. Its work, of course, is subject to the approval of the Commission, and it can establish no routes without the approval of the Commission. It has invited the criticism and cooperation of the complainant as to these routes, and has at all times expressed a willingness to eliminate any route which it has listed whenever such route is shown not to be reasonable and direct.

But without regard to what may be the purposes of the complainant or those of this intervenor, the Commission itself has found that only reasonable direct routes should be established, and its supplemental report in dealing with intervenor's routing guide says, (81 I. C. C. 249):

"The Southeastern has filed a supplemental petition, setting out in an appendix a proposed routing guide for application between points in southeastern territory and points in other territories, and asked [fol. 153] that an order be entered requiring the establishment of such routes. Although the record in this proceeding is exceedingly voluminous, it does not contain evidence respecting the reasonableness *of all of the routes contained in the guide*. An informal examination of the proposed guide indicates that some of the routes shown therein *would not be such reasonable routes as we would require to be established.*" (Italics ours.)

Thus it will be seen that the Commission, in line with its findings, is carefully scrutinizing and supervising the establishment of through routes so as to permit none to be opened which are not reasonable and direct.

In the Supplemental Report (81 I. C. C. 247), made a part of the order attacked in this proceeding, the Commission says:

"It was our expectation that the principles laid down by us in our report would be complied with without necessity of entering an order. It is now apparent that an order is necessary.

We shall at this time by order prescribe certain through routes and joint rates with respect to which the record warrants the finding that they are reasonable and will require their establishment, reserving for further consideration either upon the present record or upon further hearing the establishment of additional routes.

We are of the opinion and find that it is necessary and desirable in the public interest that through routes and joint rates applicable thereto be established between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Con-

necticut, and New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line [fol. 154] of the Southern Railway Company from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Company and the Southeastern Express Company at Washington, D. C."

Intervenor, therefore, avers and pleads that the finding of the Commission that the routes prescribed in its order are reasonable and are necessary and desirable in the public interest, is conclusive of the questions with respect to the propriety, reasonableness and public necessity for its action, and that its findings in this respect can not be interfered with by the Courts, but will be judicially respected and treated as conclusive.

9th. Paragraph nine of the bill of complaint is admitted.

10th. Paragraph ten of the bill of complaint is admitted.

11th. From lack of sufficient information intervenor can neither admit nor deny the allegations contained in paragraph eleven of the complaint.

12th. From lack of sufficient information intervenor can neither admit nor deny the allegations contained in paragraph twelve of the complaint.

13th. From lack of sufficient information intervenor can neither admit nor deny the allegations contained in paragraph thirteen of the complaint.

[fol. 155] 14th. Answering paragraph fourteen of the bill of complaint, intervenor denies that the transfer of traffic from complainant to the Southeastern Express Company at Washington would require complainant to rearrange its facilities and equipment and to install additional equipment to any substantial extent, particularly, as the Commission has found in its original report, 78 I. C. C. 134, that from a large part of the eastern territory, embraced under its supplemental order, through cars are not loaded by the complainant to southern destinations, but that the traffic has to be transferred at Washington even when handled south of Washington in complainant's service. Intervenor avers that such readjustment as would be necessary is only such as public service transportation companies are constantly making from day to day to meet the changes and variations in traffic conditions constantly occur-ing.

Except as above, intervenor from lack of definite and sufficient information can neither admit nor deny the allegations of paragraph fourteen.

Intervenor does aver and plead however that the Commission after thorough investigation has found as an incident to its order that transfers not only can but should be made by complainant to intervenor at Washington and its findings and order are conclusive

as to the reasonableness and practicability of such transfer and are not subject to judicial review.

15th. Answering paragraph fifteen intervenor admits the allegations as to the finding of the Commission set out at the opening of said paragraph, and also admits the location of Atlanta as alleged. Intervenor denies the correctness of the conclusion which complainant draws from the Commission's finding and avers that a [fol. 156] reference to the record and testimony given before the Commission will disclose that complainant's actual performance in handling traffic between New York and Atlanta is not in accordance with its schedule. While admitting that the Commission does not make an exception of the New York-Atlanta business from its order and that it requires complainant to transfer this business to the Southeastern Express Company at Washington, such requirement only applies in instances where shippers in writing route over intervenor's lines via the Washington transfer. Intervenor expressly denies that such requirement would deprive complainant of its long haul without lawful reason therefor, and without legitimate benefit to the shipping public, and it submits that complainant is concluded by the finding of the Commission that the public interest and convenience are promoted by the establishment of through joint route between Atlanta and New York. With respect to the allegations in paragraph fifteen to the effect that the Commission further finds that delivery to the consignee is the same over either the American or Southeastern lines to Greensboro, Charlotte and Concord, intervenor respectfully invites attention to a comparison of the schedules of the two express companies at these points as set out in the Commission's original report. It will be seen, insofar as Greensboro is concerned, that express carried by intervenor would reach Greensboro at 5:45 P. M. on one day, while it would reach this point over complainant's lines at 4 A. M. the next day. While theoretically deliveries of express by the two companies may be made at the same time, the margin of certainty in prompt deliveries is very appreciably greater over intervenor's lines than over complainant's lines, yet complainant denies that the public is entitled to service over intervenor's lines out of Washington on express traffic from points mentioned in the Commission's order. A similar situation exists with respect to deliveries at Charlotte and Concord, and intervenor calls attention to the report of the Commission in the instances cited by complainant, and in turn itself cites such instances, as typical of the character of the claim which complainant makes that where it has a reasonable direct route to a given point it should not be required to become a party to another route to such [fol. 157] point, and intervenor avers that the holding of the Commission that complainant should be required to join in additional through routes regardless of the fact that it may have a reasonable direct single line route, and the further holding of the Commission that complainant may be required to forego its long haul in the establishment and operation of joint routes are in contravention of no legal rights of complainant but, upon the contrary, both are justi-

fied by reason of the fact that the public interest and convenience form the basis for such holdings.

The contention of complainant with respect to the efficiency of its schedules between New York and Atlanta not only disregards the actual performance and delays encountered, which were shown in the record before the Commission, but ignores the much wider scope of southeastern territory falling within the provisions of the order attacked, which territory is reached and served over complainant's routes from the East only through the transfers at interior and remote transfer points, many of such transfers involving crosstown hauls from depot to depot by wagon or truck, and none of them affording the facilities and security for expeditious interchange provided at Washington. With respect to this situation the Commission found, in its original report, 78 I. C. C., 136:

"The American contends that in the vast majority of cases it makes each schedule, while the Southeastern argues that in most instances the present method of handling results in delaying the express. In many cases a substantial saving of time in actual performance could be accomplished by the use of joint routes through border points or transfer points allowing the American a somewhat shorter haul. Transfers at points requiring cross-town transfer or at interior points where facilities are limited and inferior to those at larger junction points often cause delay and damage."

[fol. 158] Furthermore, the Commission found, not only that the schedule of the Southeastern calling for arrival at Atlanta at 5.25 a. m., was quicker than the schedule of complainant between Washington and Atlanta, but that (78 I. C. C., 134):

"Express from New York and other eastern points could also be handled over Southern trains leaving Washington at 9 a. m., arriving at Atlanta at 5.25 a. m. the next day; leaving Washington at 3.30 p. m., arriving at Atlanta at 10.55 a. m.; and leaving Washington at 9.50 p. m., and arriving at Atlanta at 4.50 p. m. These trains handle express for intermediate main-line points, and points on connecting lines. There are other local Southern trains out of Washington which also carry express to intermediate points."

This and the other findings made in the Commission's report, are based upon voluminous evidence submitted to the Commission with respect to superiority of intervenor's service and the delays encountered in the actual handling of traffic via the routes of complainant through interior and remote transfer points, and the failure of complainant's schedules to or from such intermediate or remote transfers to connect with those of intervenor, concerning which the Commission, after a most painstaking investigation, has made specific findings with respect to public necessity and convenience for the additional routes which it has ordered established.

Intervenor therefore expressly avers and pleads that the findings of the Commission with respect to the public necessity for such additional routes covered by its order are amply supported by evidence in

the record before the Commission and such findings are consequently binding and conclusive and are not subject to judicial review.

In answer to complainant's further averments with regard to express traffic from New York, N. Y., to Atlanta, intervenor from lack [fol. 159] of information can neither admit nor deny whether the volume of such business and the revenue arising therefrom is or is not correctly stated. It denies that under any condition complainant can give a better service than can intervenor to Atlanta, and the evidence before the Commission showed that it cannot give as good service. Intervenor admits the allegation that under the Commission's order this business will be subject to shipper's routing, and that complainant may be deprived in instances of the haul from Washington to Atlanta, and the revenue accruing thereon. The fact and extent of this deprivation will depend entirely upon the character of the service which the two express companies give. Complainant will have advantage over intervenor as to solicitation of the traffic from New York to Atlanta for the reason that it originates the business and for the further reason that it will handle in its own exclusive service all unrouted business. But if intervenor renders more expeditious service and service more satisfactory to the public, in the nature of things it will secure some of the business. The Commission has found that competition at other points has bettered the express service, and guided by the actual experience and tests at other points it is to be expected that competition at Atlanta will better the service at Atlanta, and the public interest therefore requires that competition should exist at Atlanta with respect to the traffic covered by the order. It is respectfully submitted that the expense of the transfer at Washington is a well recognized incident to the transportation of express traffic. As the Commission found in its original report, with the exception of through cars from Boston, Philadelphia and New York, complainant does not load through cars to points south of Washington from this eastern territory. From a large part of the territory covered by the order the cars are loaded to break on Washington and the traffic has to be transferred at Washington, even when handled south thereof in complainant's exclusive service. It is only in the case of traffic loaded on New York, Boston or Philadelphia in through cars that through loading beyond Washington is practiced by complainant, as the Commission has found. Inter- [fol. 160] venor denies that the platform transfer at Washington will place any serious or unusual burden upon complainant, and the same is true with respect to the organization and maintenance of soliciting forces. Certainly, the necessity of maintaining soliciting forces furnishes no reason why the public should not have the benefit of competition in the express service, and this is true even though complainant might find it necessary to establish and maintain soliciting forces at Atlanta as well as at New York.

Answering the further allegations contained in paragraph fifteen, intervenor admits that the Commission has found that it has power to establish additional routes jointly over the two express companies in cases where complainant already has an established reasonable

route from an exclusive point on its line to a point common to it and intervenor and to empower shippers to route their shipments over such through joint route, although complainant in this way may be short hauled. Intervenor repeats, however, that the Commission has the power to compensate complainant for any sacrifice it may make through the division of the revenues accruing upon joint traffic handled over such additional through routes, and intervenor further avers that the promotion of competition in this way makes such additional routes both necessary and desirable in the public interest. Without entering upon a discussion of the artificial issue which complainant undertakes to make under its allegation "that the Commission has no power or authority to make or manufacture competition between carriers," intervenor avers that it is not only within the power of the Commission to prevent obstruction to reasonable competition which actually or potentially exists between carriers, but that it is its duty to exercise powers conferred upon it by Congress to stimulate reasonable and healthy competition, and that it is to the public interest that it should do so.

Intervenor avers that the obligation of the Commission to exert its powers to secure to the public the benefits of competition in the express service, and to prevent such competition from being unduly [fol. 161] restrained or stifled, here arises not only under general well recognized principles and governmental policies, but such obligation also arises from the existing status of the American Railway Express Company, and by virtue of the provisions of the uniform contracts which it has with the various railroads over whose lines it operates. The contract in question contains a provision for the pooling of traffic and division among the contract railroads (many of them competing railroads) of the aggregate or net proceeds of earnings coming to such railroads otherwise than according to individual performance, and such arrangement is a pooling arrangement within the purview of Section Five of the Interstate Commerce Act as amended. Ex parte Number 76, Express Contract 1920, 59 I. C. C. Reports 518.

The Commission had no authority to approve such pooling arrangement had the same at the time of its approval resulted in unduly restraining competition; nor can its approval continue effective if such arrangement, now that another express company has commenced operations, results in unduly restraining competition. Intervenor shows that the Commission approved such contract when there was only one express company, namely, complainant, in operation and that complainant is now undertaking, by virtue of the pooling arrangement which it has with certain railroads under the terms of said contracts, to unduly stifle and restrain competition. For instance, take the express line of complainant from New York to Atlanta; such line is constituted by combining the rails of the Pennsylvania Railroad Company, the Richmond, Fredericksburg and Potomac Railroad Company and those of the Seaboard Air Line Railway. There is sharp competition from Washington south between Southern Railway Company lines and those with which complainant has contracts, and for the purposes of its claim to a con-

tinuous haul from New York to Atlanta, it is necessary that complainant by its arrangement for pooling of traffic and earnings merge the lines of separate, independent, and competing railroads with, the result that if said long haul is maintained and shippers are denied the right to route their shipments over intervenor's lines with [fol. 162] transfer at Washington, there will be no competition in the express service from Washington to Atlanta on business originating north of Washington within the territory covered by the Commission's order, nor will there be competition between these points on traffic from the South moving in the reverse direction, and destined to points north of Washington. Under such pooling arrangement, complainant is also enabled to eliminate and stifle competition between the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company between New York, other eastern points and Washington. Intervenor alleges, therefore, that complainant has secured its so-called long haul solely by a pooling arrangement within the continuing control of the Commission and which the Commission can only approve and permit to continue provided the same does not unduly restrain competition. Intervenor submits that it was the duty of the Commission not only to assert its power in the interest of the public to promote fair and reasonable competition in the express service in the South, but that it was and is the special duty of the Commission to see that its approval of the pooling arrangement and combination embodied in and underlying complainant's uniform contract with the railroads is not so used and availed of by complainant as to unduly restrain competition and thus violate one of the conditions upon and subject to which authority of the Commission to approve said contract was granted by Congress.

All further allegations contained in paragraph fifteen which are not herein specifically answered are denied.

18th. The allegations of paragraph eighteen are denied.

19th. Answering paragraph nineteen of the bill of complaint intervenor admits that the traffic affected by the order under attack consists of many units or separate shipments. It further admits that [fol. 163] such traffic as may be handled over the joint routes which the Commission by its order has established would give rise to revenue which must be divided between complainant and intervenor. The process of dividing the revenue and of keeping the accounts, however, would introduce no innovation into the express service as such accounts and divisions are now being kept by the two express companies, and intervenor denies that any problem of extreme difficulty involving great expense will arise if the order of the Commission goes into effect, and intervenor further denies that there is the slightest danger of a possibility that it will become indebted to complainant on traffic balances to a sum equal to its capital and assets, and it further expressly denies that complainant is in danger of any loss of revenue growing out of indebtedness to it by intervenor.

20th. Answering paragraph twenty, intervenor denies that the Interstate Commerce Commission has made no specific finding to the effect that the routes and schedules which complainant is using for the transportation of express shipments from the territory mentioned in said order to destinations therein referred to are unreasonable. It admits that the Commission said in its report that because the American Company may have worked out other reasonable routes such fact furnishes no reason for permitting reasonable routes in connection with the Southeastern Express Company to be closed. Intervenor avers that such holding of the Commission is legal, is based upon the public interest and convenience, and that under paragraph 3 of Section 15 of the Interstate Commerce Act as amended, it was mandatorily the duty of the Commission to require complainant to establish other reasonable routes in connection with Southeastern Express Company. Intervenor avers that such finding is amply sustained by the evidence before the Commission and is conclusive and binding.

The portion of paragraph twenty in which complainant puts its construction upon the action of the Commission in the foregoing re- [fol. 164] gard is not strictly accurate. The use of any joint routes with Southeastern Express Company cannot be required on traffic originated by complainant unless shippers, by routing instructions, desire to avail themselves of intervenor's service to the extent in which it may participate in the transportation. It is apparent, therefore, that if the complainant has, as it claims, as expeditious and dependable single line routes as are the joint routes which will be established under the Commission's order, whether or not it will be required to turn over much, little or any of the traffic to intervenor will depend upon the character of the service which each express company renders to the public, and thus both express companies have the highest incentive to improve their service and to maintain efficient service, and the benefit to the public from this condition is manifest.

21. Answering paragraph twenty-one of the bill of complaint, this intervenor from lack of definite information is unable to admit or deny the correctness of the details of illustration set out in said paragraph as to the handling by complainant of a shipment originating at New York, nor has it sufficient information to enable it to either admit or deny that the expense of handling shipments at New York is very great.

Intervenor admits that under the plan of the Commission a shipper may direct that his shipments from New York be turned over to the Southeastern Express Company at Washington and a segregation under such circumstances from other shipments may be necessary. Intervenor further admits that under shipper's routing the haul of the complainant may be limited to the distance between New York and Washington and that the balance of the haul may, under shipper's direction, be over the line of railway with which intervenor has contracted. Intervenor avers, however, that complainant has submitted its property to a public use and has, therefore, rendered itself amenable to reasonable public regulation, and that the order of the

[fol. 165] Commission which complainant attacks does not transcend the bounds of the Commission's power, nor does it unconstitutionally invade complainant's property rights.

Intervenor further avers that the situation described in that portion of paragraph twenty-one in which complainant complains that it may be necessary for it to maintain all of its organization and facilities in preparation for the handling of a maximum traffic from New York, as it can never know what will be left in its cars and what will be taken out through shipper's routing, is one which constantly confronts transportation companies and that everyday study and foresight will easily solve the question of the traffic for which it must make preparation to handle beyond Washington and that which it will be required to turn over to the Southeastern at Washington. The character of an express company's organization and properties is such that readjustment to the varying needs of traffic at different points and the ebb and flow thereof from day to day can be very easily made; and intervenor further avers that in considering the situation which complainant undertakes to depict in paragraph twenty-one the Court must have in view and presume that the Commisison will see that full justice is done to complainant in fixing the division of the revenues between the two express companies and which may accrue from the joint business originating at New York.

Except as herein answered, the further allegations of paragraph twenty-one are denied.

22. Answering paragraph twenty-two of the bill of complaint, intervenor denies that the order of the Commission, dated July 9th, 1923, is erroneous, invalid, unlawful and void for all or any of the reasons set forth in said paragraph.

Specifically answering subdivision "A" of paragraph 22, intervenor denies that said order violates the Constitution of the United States and the Fifth Amendment thereof and denies that said order [fol. 166] deprives complainant of its liberty and property without due process of law. Intervenor avers that complainant, having subjected its properties to a special public use and having entered upon and being engaged in interstate transportation by express, is compelled to meet the needs and requirements of the express business. It avers that the Interstate Commerce Commission, after extended study, has defined the express business, its nature and incidents; that while stating that the express companies perform a service which otherwise would devolve upon the railroads of the country the Commission has found and declared, in substance, that express companies have added distinctive features to such business, have specialized it and have given it characteristics which distinguish it from other forms of transportation, the Commission having analogized it to the mail service. The nature of the express business has impressed it with definite characteristics, and the exigencies of the service distinguish it from freight and passenger transportation.

The Commission in the Express Cases, 28 I. C. C., on page 139 says:

"As a result of its investigation the Commission was convinced that if unbearable discrimination and confusion was to be avoided its order must take into account the entire body of rates for express service. *In this respect the express service is radically different from the services performed by the railroads in the carriage of passengers and property and is more precisely comparable with the service performed for the public by the Postoffice Department.*" (Italics ours.)

The rights of individual express companies, even in the cases instanced by the complainant in exag-erated form, have had the careful consideration of the Commission.

In the Express Cases, 24 I. C. C., on page 411, the Commission uses this language:

[fol. 167] "We have said to these carriers, in connection with the discussion of the establishment of through routes and rates, that in their arrangements for the division of earnings due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own lines, and that divisions shall be agreed upon which shall compensate the originating carrier for its sacrifice."

It may be added that in the event the two express companies cannot agree upon divisions upon the basis announced in the above quoted language, the Commission itself has the power to fix such division.

Intervenor, therefore, respectfully submits that any and all property rights which complainant may have under the guaranty of the Fifth Amendment to the Constitution of the United States are fully protected and guarded by the principles announced by the Commission and which will apply to the joint routes established by its order of July 9th, 1923.

Specifically answering subdivision "B" of paragraph twenty-two intervenor denies the allegation that the order of the Commission does not conform to the statutory authority in the respects and for the reasons stated in said subdivision "B," and it avers that the reasons upon which complainant bases its allegation that the order of the Commission does not conform to the statutory authority of the Commission are unsupported by the real facts and that the arguments made to support the same in subdivision "B" are unsound and fallacious.

The assertion by complainant of its alleged right to secure its longest possible haul on traffic originated by it moving from one of its exclusive offices and destined to an exclusive office of intervenor utterly ignores the fact that in every such instance complainant would short-haul intervenor, and while securing its longest possible haul would allow intervenor the shortest possible haul. Even if [fol. 168] there be any constitutional question involved under the Fifth Amendment, the property rights of intervenor are as sacred under the guaranty of said Fifth Amendment as are those of complain-

ant. Concerning this very phase of complainant's contention the Commission, in its original report, said, 78 I. C. C., 133:

"If this traffic were transferred at Washington, it would move over the Southeastern's direct route. The American claims that it is unreasonable in view of its present service to compel it to abandon any traffic to, or to share traffic with, the Southeastern. On the same theory, the Southeastern might decline to join in through routes to or from its exclusive points unless it were given the long haul."

Specifically answering subdivision "C" of paragraph twenty-two, Intervenor denies the allegation therein to the effect that the order of July 9th, 1923, does not conform to the statutory power of the Commission for the alleged reason that complainant is a carrier by railroad within the meaning of the Fourth Paragraph of the Fifteenth Section of the Interstate Commerce Act quoted by complainant. Intervenor denies that complainant is a carrier by railroad within the meaning of said provision of the Interstate Commerce Act, and it avers that the Commission has correctly found that Paragraph 4 of Section 15 of the Act is not applicable to express companies. Intervenor avers, in connection with the further allegations in subdivision "C" regarding the establishment of through routes by the Commission in spite of the fact that complainant may have single line routes which are reasonable and direct, that the fact of the existence of one reasonable route is no obstacle under the law to the establishment of other reasonable routes. The history of the Congressional legislation bearing upon this matter shows that the existence of a reasonable route under the law at present does not preclude the establishment of other reasonable routes. The power of the Commission to establish joint routes, under the Act of Congress of June 29th, 1906, did preclude the establishment of a joint route where a reasonable or satisfactory through route already existed, but [fol. 169] this limitation upon the power of the Commission was removed by the amendment to the Act to regulate Commerce passed on June 18th, 1910. Under the law as amended on the last named date a discretionary power was vested in the Commission to establish through routes; but when the law was later amended by the Act of February 28, 1920, there was added to the language, "The Commission may" the further language, "And it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated * * *"

It is respectfully submitted, therefore, that the Commission, having found that the joint through routes intended to be opened up by virtue of its order of July 9th, 1923, are necessary and desirable in the public interest (the statute is "necessary or desirable") it was its duty under the mandate of Congress to establish such joint

routes and that its findings and decision with respect to the necessity or desirability of such additional through routes are final and conclusive.

Specifically answering subdivision "D" of paragraph twenty-two intervenor denies the allegations therein made.

Intervenor specifically denies the allegations contained in subdivisions "E" and "F" of paragraph twenty-two.

Answering subdivision "G" of paragraph twenty-two, intervenor specifically denies the same. It avers that complainant, having by stipulation of record agreed to and requested a postponement of decision upon the question of divisions, is estopped from now attacking the order upon the ground that routes are ordered to be established before a division of compensation to complainant has been provided.

[fol. 170] 23. Answering paragraph numbered twenty-three of the bill of complaint, intervenor denies the allegation that if the order of the Commission is permitted to go into effect the property of complainant will be taken without due process of law, and it further denies the allegation that said order is illegal and invalid. It can neither admit nor deny what the result will be in the way of suits or actions against complainant if said order should be allowed to go into effect, though it expressly denies that the public will be inconvenienced and the movement of traffic disarranged to the great inconvenience either to complainant or to the public.

Intervenor denies that complainant will suffer irreparable damage unless the order of the Commission is suspended or set aside.

24. Answering paragraph twenty-four, intervenor avers and sets up that complainant is entitled to none of the relief therein prayed and respectfully submits that all the prayers contained in said paragraph "A" to "F" inclusive, should be denied and that the bill of complaint should be dismissed.

Chas. J. Rixey, Sanders McDaniel, Attorneys and Counsel for Intervenor, Southeastern Express Company.

[fol. 171] Jurat showing the foregoing was duly sworn to by J. B. Hockaday omitted in printing.

[fol.172] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

ORDER ALLOWING INTERVENTION OF SOUTHEASTERN EXPRESS COMPANY—Filed September 12, 1923

It appearing to the court that Southeastern Express Company is interested in sustaining and upholding the order of the Interstate Commerce Commission attacked and sought to be enjoined by the complainant in the cause, the American Railway Express Company; and

It further appearing that Southeastern Express Company was a complainant in the proceeding before said Interstate Commerce Commission in which said order was rendered; and

It further appearing that said Southeastern Express Company has the statutory right to intervene in the cause, and it having presented to the Court an intervention which embodies an answer to the bill of complaint;

It is therefore ordered that said intervention be allowed, said answer be filed, and that said Southeastern Express Company be made a party defendant in the cause.

Samuel H. Sibley, U. S. Judge.

[File endorsement omitted.]

[fol. 173] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed September 19, 1923

This cause having been submitted upon evidence and argument to a court composed of the Hon. Nathan P. Bryan, United States Circuit Judge, Hon. Robert T. Erwin, United States District Judge and Hon. Samuel H. Sibley, United States District Judge, upon a motion for an interlocutory injunction, and the Court not being yet sufficiently advised to render a decision thereon, it is now ordered, pending such decision, inasmuch as irreparable damage will otherwise ensue, that the parties to this bill be each and all temporarily restrained from enforcing or executing the order of the Interstate Commerce Commission set forth in the petition for sixty (60) days from this date, or until a decision of the Court upon the interlocutory injunction is rendered. This September 19th, 1923.

N. P. Bryan, United States Circuit Judge. Robert T. Ervin, United States District Judge. Sam'l H. Sibley, United States District Judge.

[File endorsement omitted.]

[fol. 174] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION

[Title omitted]

DECREE OF INJUNCTION—Filed October 11, 1923

This case came on for hearing upon a motion for an interlocutory injunction before a special court composed of Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin,

United States District Judge and Honorable Samuel H. Sibley, United States District Judge.

After hearing evidence and argument and being advised, a majority of the Court entertaining the views expressed in an opinion filed herewith, in accordance with them it is considered and adjudged that the execution and enforcement of the order of the Interstate Commerce Commission set forth in the petition be and the same is hereby enjoined pending the further hearing of this case and until the further order of the Court; without prejudice, nevertheless, to the right of the Interstate Commerce Commission to make further enquiry and to establish such through routes in the territory involved as shall be within the exceptions and provisos of Paragraph 4 of Section 15 of the Interstate Commerce Act and not in conflict with the prohibitions of said paragraph of said Section as set forth in the opinion and judgment of this Court.

This October 11th, 1923.

N. P. Bryan, United States Circuit Judge. Robert T. Ervin, United States District Judge. Sam'l H. Sibley, United States District Judge.

[File endorsement omitted.]

[fol. 175] IN UNITED STATES DISTRICT-COURT

OPINION—Filed October 11, 1923

American Railway Express Company seeks in this proceeding to enjoin the enforcement of an order of the Interstate Commerce Commission, granted at the instance of the Southeastern Express Company. That order requires the establishment of additional through routes between named regions north of Washington, served exclusively by the American Railway Express Company and certain points on the Southern Railroad south of Washington, with transfer at Washington, notwithstanding the existance already of reasonable through routes; and that shippers shall have the choice of routes. The proceedings are reported in 78 I. C. C. 126 and 81 I. C. C. 247. It is not contended that the existing through routes are discriminatory or unreasonable, but the purpose of the order is stated by the Commission to be "That there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Company (Washington), and the other via the transfer point selected by the American Railway Express Company." The transfer point selected by each company for each route is, of course, such as will give it the longest possible haul. The Commission found that the competition between the two companies to get a favorable routing by shippers would result in better service and that, for this reason, the additional routes ordered to be established were necessary and desirable in the public interest.

The American Railway Express Company contends (1) that under the order traffic originated by it in its exclusive territory north of Washington would be unnecessarily diverted from it at Washington to its competitor, thus depriving it, in many instances, of its long haul arbitrarily and unreasonably: (2) That thereby also it would be deprived of its liberty to contract and its property right in its business and the profitable conduct thereof, contrary to the Constitution; (3) That inasmuch as the additional through routes include less than the entire length of its lines between the respective termini, [fol. 176] the order is contrary to paragraph 4 of Section 15 of the Interstate Commerce Act: (4) That the division of the joint rate not having been fixed the joint route cannot be lawfully required to be put into operation: (5) That the giving to the shipper absolute choice of routes is authorized by no statute even though the establishment of the routes themselves be validly ordered.

1. By Paragraph 3 of Section 15 of the amended Interstate Commerce Act power is clearly given the Commission, either on complaint or on its own initiative, to establish through routes when deemed necessary or desirable in the public interest. When one sufficient through route already exists there can be no necessity for another in the strictest sense, but certainly another may be desirable in the public interest. The competition between the carriers interested in the routes is generally considered to be itself in the public interest, because better service is likely to ensue. The repeal by the Act of June 18th, 1910, of the proviso which formerly prevented the enforced duplication of routes shows the Congressional intent that it should be allowed. We are not prepared to say the order is arbitrary or unreasonable because made avowedly to foster competition.

2. Nor do we think the order infringes the Constitutional guarantees to liberty and property in giving the shipper an election which may deprive the American Railway Express Company of its long haul. If otherwise valid, it is only a part of the system of regulation and rate making to which public service companies consent or at least subject themselves when they enter the business. Such regulation when done in the public interest and not arbitrarily is not unconstitutional. Besides it must be assumed that full justice will be done when the rate comes to be divided.

3. We think the order transgresses the prohibition of Paragraph 4 of Section 15 of the Interstate Commerce Act; "In establishing any [fol. 177] such through route the Commission shall not (except as provided in Section 3 and except where one of the carriers is a water line) require any *carrier by railroad*, without its consent, to embrace in such route substantially less than the entire length of *its railroad* or of any intermediate railroad *operated in conjunction and under a common management and control therewith* which lies between the termini of such proposed route, unless such *inclusion of such lines* would make the through route *unreasonably long* as compared with another practicable route which could otherwise be established." (Italics always ours.) No water carriage is involved here. Section

3 is not sought to be applied, and the existing routes which embrace all of the lines of the American Railway Express Company between the several termini involved are not held by the Commission to be unreasonably long. The quoted provision is therefore transgressed if the words "Carrier by railroad" include such an express company as the American and if "its railroad" and "railroad operated in conjunction and under a common management" may be applied to its lines of transportation.

"Carrier by railroad" is a phrase much used by Congress in recent legislation. Its literal meaning is, one who carries by means of a railroad—who *uses* a railroad in his carriage. It is opposed to carrier by any other means, such as "carrier by water" or by highway, or by air. There is no greater necessary implication of ownership of the railroad used by the one than by the sea, river, public road or atmosphere used by the others. But the fact is that those who carry by means of railroads are so predominantly the railroad companies that they alone are generally in mind, and words used in legislation are apt best to fit them and their concerns. "Carrier by railroad" is an abbreviation envolved from the words of Section 1 of the original Interstate Commerce Act; "Common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water." Because the Act considered itself so largely with things that railroad companies alone had and con-[fol.178] trolled, and with duties which they alone could perform, the Interstate Commerce Commission early held that only railroad companies were intended to be described, notwithstanding the acknowledged breadth of the language and notwithstanding much of the legislation could and should be applied to express companies: In re Express Companies, 1 I. C. C. 349. In other Acts, such as the Safety Appliance Act of 1893, 27 St. 531; and of 1908, 35 St. 476; the Boiler Inspection Act of 1911, 36 St. 913; Railroad Arbitration Act of 1913, 38 St. 103; Hours of Service Act of 1907, 34 St. 1415; Reports of Accidents Act of 1910, 36 St. 350; Employers Liability Act of 1908, 35 St. 65, the same or similar words are used with application to such persons or things as pertain to railroad companies only. The Employers Liability Act has been held not to apply to express companies in view of the contents of the Act, and the expression "Common carriers by railroad" and its equivalents in this and other acts was said to refer only to carriers owning and operating railroads: Wells Fargo Co. v. Taylor, 254 U. S. 175, 187. It may even be conceded that such is now the common and prima facie meaning of the expression. But in none of these acts did Congress *define* the term "carrier." In the case of the Interstate Commerce Act, Congress, by an amendment of June 29th, 1906, brought pipe line carriers under the Act by the simple declaration that "the provision of this Act shall apply" to them. But to bring express and sleeping car companies within it, it proceeded to *define the term* "carrier" otherwise than it had been construed by the Commission. The enactment was that the term "Common carrier as used in this Act *shall include* express companies and sleeping car companies." This was

a legislative reversal of previous construction, whether by Commission, Courts or public. Effect must be given to it by making the term include those companies whenever used in the Act and its amendments. By so doing the words of the first section must read "common carriers including express companies and sleeping car companies engaged in the transportation of passengers or property wholly [fol. 179] by railroad etc." Thereby *such* express companies as carry property *by railroad* and *such* sleeping car companies as carry passengers *by railroad*, and only such, are made subject to the Act. The matter is followed up by broadening the definition of "railroad" to include not only railroads owned or operated under any sort of contract, but "terminal facilities of every kind *used or necessary* in the transportation or delivery of property," and of "transportation" to include the use "of cars and other vehicles and all instrumentalities and facilities of shipment or carriage *irrespective of ownership*, or of any contract, express or implied, for the *use* thereof, and all services in connection with * * * the handling of the property transported." These latter definitions were framed with a purpose of adapting the terms used in the Act to the broadest possible application to the means of carriage employed by the various carriers of passengers and property now brought under the Act, and to apply to them what had been specially ordained for railroad companies only. In this same Act, in its amendment of Sec. 6, is, so far as we can find, the first used by Congress of the short expression "Carriers by railroad." It occurs in the requirement that "Carriers subject to the Act—all of them—shall file and publish their rates from points on their own lines to those on the lines of *"other carriers by railroad, by water or by pipe line."* Very plainly all the carriers subject to the Act are intended to be included in this threefold classification, and *"Carriers by railroad"* includes not only railroad companies but express and sleeping car companies which use railroads in carriage. It was a short equivalent for the language of Section 1, "Common carriers engaged in the transportation of passengers or property by railroad" and included what that included. Out of abundant caution however, Section 6 was made also to declare that "Carrier wherever used in this Act shall mean common carrier." The phrase "Carrier by railroad" was introduced into Paragraph 4 of Section 15 by the Transportation Act of 1920. It is used often [fol. 180] in that Act but since for the differing purposes of the Act the term "Carrier" is formally defined in no less than six different ways, some including, some excluding express companies (see Secs. 204 (*a*), 209, 300, 400, 422 and 439), no help can be got from the portions of it other than that amending the Interstate Commerce Act; any more than from the numerous former Acts in which it is not defined at all. The amending portion of the Transportation Act rearranges, but retains, the definitions of the Act of 1906, and in Paragraph 4 of Section 15 substitutes the words "Carrier by railroad" for the word "Company." The retention of "Company" was not desirable because it would exclude individuals and would include carriers by water, pipe line, wire or wireless, which was not intended.

We feel constrained to hold that "Carrier by railroad" by the dictionary of the Act, means here just what it did when first used by the Act of 1906, to-wit: "common carrier including express and sleeping car company, which carries by railroad."

It must be admitted that there are portions of the Act that cannot be *applied* to express and sleeping car companies, though they are "carriers by railroad" or "carriers subject to this Act" as the case may be. Thus requirements as to passenger service cannot be applied to express companies because they do not carry passengers, nor can those as to freight be applied to sleeping car companies for like reason; nor can those relating to engines, switches and tracks or train operations apply to either, because neither has them. But the use in Paragraph 4 of Section 15 of the expression "its railroad" or "railroad operated in conjunction with it" do not make such a case. The thing dealt with in paragraphs 3 and 4 of Section 15 (which are to be construed together) is not one that touches the owner or operator of a railroad and that could be answered for only by such an one. It touches the furnishing to the public of a through railroad transportation service, which the express company has and can answer for. So far as the public and this service are concerned it matters not who [fol. 181] owns or operates the railroad, or under what sort of an arrangement the express company obtains the use of it and its equipment. As respects this service, the owner and operators of the railroads are the servants and employees of the express company; 6th Cyc. 369, Note 37, and cases cited. So far as its patrons are concerned, the railroads used by the express company are in a substantial and legal sense "its railroads." Yet again, the definitions of "railroad" and "transportation" in the dictionary of the Act are broad enough to cover all the facilities for carriage and delivery which the express company itself owns and operates, as well as its privilege of carriage over the railroad tracks "irrespective of ownership or any contract express or implied for the use thereof." The case, indeed, is not one of ordinary construction in which the reasonable intent of Congress is to be gathered from the context, but is rather one of executing a positive legislative mandate defining terms. The only question is whether the provision of the statute can have any reasonable application under these definitions, and we think it can. Since "carrier" wherever used in the Act means "common carrier" and since "common carrier as used in this Act shall include express and sleeping car company," "Carrier by railroad" in paragraph 4 Section 15 must be read "Common carrier, including express and sleeping car company, by railroad." And so read the provision can reasonably be applied to an express company, and its transportation arrangements with and over railroads, referred to as "lines" in the end of the paragraph under discussion.

Leaving discussion of words, we are confirmed in this interpretation by considering the possible reasons which may have moved this enactment. The main purpose was, in substitution for the original prohibition against establishing another through route when one was already in existence, to extend protection to initial carriers by railroad against being compelled unnecessarily to "short haul them-

[fol. 182] selves." Reasons which occur to us as perhaps moving thereto are: (1) The natural justice in permitting one who initiates a thing to carry it forward and reap its benefits as far as possible. This has been recognized by the Commission in Dakota Junctions, 81 I. C. C. 275, Western Mines, 66 I. C. C. 108, and by this court in American Railway Express Co., v. Railroad Commission of Georgia, 274 Fed. 649. This reason would apply as strongly to an express company as to a railroad company. (2) The amendment of 1906 had imposed on the initial carrier responsibility for the whole carriage. It would seem right that it carry and control the shipment as far as possible—a reason applying with equal force to railroad and express companies. (3) The uncertainty, delay and risk of loss and damage incident to unnecessary transfers would apply equally to freight and express. (4) The investment of the carrier on which it must make a return may differ in degree as between railroad and express companies, but not in substance. That the amount of investment itself was not controlling appears in that a railroad which is merely *operated* is expressly protected equally with one *owned*. Many railroad companies merely run a train over the road of another, as in the case of trains running into Washington from Richmond, paying for the privilege no more, perhaps, than the express company pays for its transportation arrangements. We can think of nothing that can be said to differentiate an express company's "line" from a railroad company's "line," unless that of the express company is longer, usually covering many railroads. But again the length of the "line" is not made material unless in comparison with the *proposed new route* it is unreasonably long.

4. The objection to the order that it puts a route into operation without having first fixed the division of the rate is unsustainable. The record shows a waiver of the matter. Furthermore, the prefixation is not required by the Interstate Commerce Act: Railway Co. v. United States, — U. S., —, decided February 19, 1923. And lastly the division can often be more justly made after some trial of the new route.

[fol. 183.] 5. Whether the shipper's choice of routes when established follows as a necessary consequence of the establishment of them, or whether the Commission has power, under paragraph 3 of Section 15, to provide for it as one of the "terms and conditions" on which the route is to be used, or whether the power is to be considered as given by an application to express companies of paragraph 8 of Section 15, we do not find it necessary to decide. Having concluded that the order before us is violative of paragraph 4 of Section 15, it must be enjoined irrespective of whether the new rates, if established, would open an insistence of their use to the shipper or to the *Court*eastern Express Company. That one or the other or both should have the right to use them must be true or else the opening of them over the objection of the American Railway Express Company would be a quite idle performance. An interlocutory injunction will be granted, but without prejudice to the right of the Commission to enquire whether, because the existing routes are unreasonably long or for other cause particularly appearing, any of the pro-

posed new routes can be established consistently with Paragraph 4 of Section 15 of the Interstate Commerce Act, and if so to order their establishment.

Sam'l H. Sibley, U. S. Judge.

IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed October 11, 1923

BRYAN, Circuit Judge, dissenting: During the war all express companies then existing were consolidated into the American Railway Express Company, which after the consolidation was the only express company in the country. It operated on all railroads from July 1, 1918, until May 1, 1921, when the Southeastern Express Company entered the field and began to do business over what is called the Southern Railway System, principally in territory south of the Ohio and Potomac Rivers, and East to the Mississippi River, although it also operates over an electric railway line from Washing- [fol. 184] ton to Baltimore, and over the Maryland & Pennsylvania Railway Company from Baltimore to York, Pa. The territory selected by the Southeastern was promptly abandoned by the American. The Southeastern attempted to concur in the tariffs of the American, but the latter attempted to prevent this by supplements, by which it made applicable through routes and joint rates only between its exclusive offices and the exclusive offices of the Southeastern.

After hearings upon application made by the Southeastern and certain shippers, for through routes between the two express companies, the Commission reviewed the proceedings before it in two opinions reported in 78 I. C. C. 126, and in 81 I. C. C. 247. Among other things, the Commission found that "Express shipments from a southeastern exclusive point to an American exclusive point move over a through route at a joint rate. From an intermediate common point, a shipment over the same route is assessed the combination rate, which is higher. * * * Undue prejudice is said to result from the fact that between exclusive Southeastern points and exclusive American points through routes and joint rates apply, while between near-by common points and American exclusive points a shipper has access only to the American route in the absence of proportional rates; and from the fact that some common points are accorded joint routes to and from American exclusive offices and other common points are not."

And thereupon the Commission entered an order requiring the plaintiff company to establish and maintain "through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Company

from Washington to and including Birmingham, Ala. on the other, with transfer between the American Express Company and the Southeastern Express Company at Washington, D. C."

[fol. 185] The order further required that the new rates should not exceed the rates then existing, and that shippers should have the right to designate in writing over which through route shipments of express should be transported.

The plaintiff contends that the order should be enjoined, because: (1) the Commission was without statutory authority to make it; (2) it is unjust and unreasonable, and is the taking of property without due process of law, in violation of the Fifth Amendment; and (3) a division of earnings is not prescribed.

1. The Interstate Commerce Commission did not have the power to establish through routes under the original Interstate Commerce Act of 1887; but by the amendatory act of June 29, 1906, 34 Stat. L. 584, it was empowered to establish through routes and to prescribe the terms and conditions under which they should be operated "when that may be necessary to give effect to any provision of this act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists." The proviso was stricken out in 1910, at which time it was provided that "in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." 36 Stat. L. 552.

The establishment of through routes under the Act of 1910 was dependent upon the failure of the carriers to establish voluntarily such through routes, but in 1920 by the Transportation Act, 15 (3), they were authorized to be established whenever necessary or desireable in the public interest. Limitation upon the right to establish through routes was not substantially changed, "except as [fol. 186] provided in Section 3" and except that for the word "company" in the Act of 1910, the words "carrier by railroad," which the majority opinion holds includes express companies, were substituted in Section 15 (4) of the Transportation Act of 1920, and the limitation was further made subject to cases of emergency.

The language, in the original act of 1887, "the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement," (24 Stat. L. 379) was early held by the Interstate Commerce Commission not to include express companies. Express Cases, 1 I. C. C. 677. But it was provided in the Act of 1906 that the term "common carrier"

should include express companies, and they are clearly within Section 15 (3) of the Transportation Act of 1920, where jurisdiction is given to the Commission to establish through routes "applicable to the transportation of passengers or property."

In the Transportation Act, the term "carrier by railroad" is usually employed to designate railroad companies. Section 1 (10, 11, 12, 13, 14, 21). Express companies, the Pullman company, pipe lines and telegraph and telephone companies are usually referred to as carriers or common carriers subject to the act. Sections 2, 4, 5, 6, 7, 8, 9, 10, 13. However, the terms by which the various carriers are intended to be designated are not always used. This should afford no occasion for surprise, since the act has been so often amended and the jurisdiction of the Commission has been enlarged by the use of general terms to include express companies and other common carriers which were not originally subject to the act. It is said that unless the term "carriers by railroad" be construed to include express companies the jurisdiction of the Commission would be much curtailed, and especially as it exists by reason of sections 1 (16, 24); 6 (1), and 3 (2). Section 1 (16) refers to routing traffic over other lines whenever any carrier by railroad subject to [fol. 187] this act is unable to transport it so as properly to serve the public." It will be noted that the language is made a little broader by including the words "subject to this act." But if it means railroads only, it is not apparent that any important jurisdiction would be lost. Express traffic moves over railroad lines and the power is given to divert traffic if the railroad company is unable to handle it.

Section 6 (1) imposes the duty upon express companies, as well as other carriers, to publish schedules of rates. It is clear that it is the intention to make this requirement apply from points on the route of one carrier to points on the route of another carrier. In doing so the second named points are defined as being on the route of another carrier by railroad, by pipe line or by water. It may be that the language was not happily chosen to define the points of destination, but the context clearly shows that express companies are included. There can be no destination points of express companies within the jurisdiction of the Commission which are not upon the route of a carrier by railroad or water, because every point on a route of an express company is also a point upon a route of a railroad company.

In construing section 1 (24), no difficulty is encountered in concluding that express companies are included within the language, "any common carrier or railroad or water or otherwise."

It will be noted that in section 3 (2) there is added to the usual designation, "carriers by railroad," the words "subject to the provisions of this act." It is at once apparent that the designation is different from that used in section 15 (4).

The plaintiff argues that shippers of express are given the right to designate the routing of it by section 15 (8), although the carrier

there defined "is any railroad corporation being a common carrier." If that be true, it only emphasises the importance of considering the context in an effort to ascertain the meaning of the language used in any particular paragraph.

The expression "any carrier by railroad" in section 15 (4) is [fol. 188] limited and qualified by the language, "the entire length of its railroad and of any intermediate railroad operated in conjunction or under a common management therewith," etc. But it is insisted that the limitation and qualification are intended to designate user instead of ownership. That construction, as it appears to me, cannot possibly include "any intermediate railroad operated under a common management or control" with the first named railroad. What we are asked to do is to apply to an express company language which is descriptive only of a railroad company. Express companies as such do not have intermediate railroads upon a route under their management or control, separately or in connection with others. Section 15 (3) grants the power to establish through routes, "applicable to the transportation of passengers or property," as therefore applicable to both railroad companies and express companies. But the limitation in 15 (4) applies only to railroad companies; as they usually, and not inadvertently, are referred to in the act, and further indicates that the term "carrier by railroad" is employed in the usual, and not in an exceptional sense, by recognizing a common practice of consolidations of lines of railroads by railroad companies, —a practice which never has been, and could not be, indulged in by express companies.

The liability of the initial carrier, whether railroad company or express company, for loss or damage to shipments, described in section 20 (11) is appealed to as a reason for including express companies along with railroad companies in section 15 (4), so as to enable such express companies to protect themselves, so far as possible, against liability due to the default of connecting carriers. It is not to be assumed that the Commission would establish through routes and compel the initial carrier to deliver either freight or express to a connecting carrier which was unable to make good any loss caused by it.

Although it is conceded that a shipper of express has the right to route, yet the plaintiff contends, since such right did not exist at common law, it is not conferred by the act unless by section 15 [fol. 189] (8). The Commission defends that part of its order allowing routing by shippers by a provision of section 15 (3), which authorizes it to prescribe the terms and conditions under which through routes may be operated, and also by sepecial rule 3, providing for the routing of express by shippers, prescribed by it and acquiesced in by the plaintiff. When the act conferred upon the Commission the power to establish through routes, it thereby took away from the initial carrier the common law right to select its connecting carriers. As stated by the Commission in its opinion, the establishment of through routes would be of no advantage if shippers

could not make use of them. Furthermore, I think it is clear from the act that express companies do not stand on the same footing as railroad companies. Formerly the several express companies operated in different parts of the country, and upon all the railroads in their respective territories. There was a semblance of competition between several of them in some parts of the country, but, because of their intercorporate relations, as pointed out by Commissioner Lane in the Express Cases, 24 I. C. C. 379, there was little actual competition. The contract between the American Express Company and the railroad companies over whose lines it operates provides for a pooling of freights and a division of earnings, which is made unlawful except by permission of the Interstate Commerce Commission, acting in the public interest. Section 5 (1); and can exist only under such rules and regulations and upon such terms and conditions as the Commission finds to be just and reasonable. Section 5 (2). Such contract is also subject to any supplemental orders the Commission may deem necessary or appropriate. Section 5 (3). And the act specifically requires that within 30 days from its approval the plaintiff herein make application to the Commission for the consolidation which it now enjoys. Section 5 (7). It therefore seems to me that, in establishing through routes for express companies and in dealing generally with them, the Interstate Commerce Commission has practically unlimited power, including [fol. 190] that to require routings by shippers to be complied with; provided always its acts are just and reasonable, and not arbitrary.

If express companies are included within the term "carriers by railroad" in section 15 (4) and therefore have a right to the long haul over the railroads with which they have contracts, then the American Railway Express Company, having such contracts with all railroad companies except the Southern, has it within its power to prevent competition by other express companies, and thus, to a considerable and dangerous extent at least, to monopolize the express business of the entire country. The whole history of the Interstate Commerce Act, and of the many amendments to it, repels the idea that such a result was ever intended by the Congress.

2. It is to be conceded that the Interstate Commerce Commission cannot order an express company to do an unreasonable thing. It cannot arbitrarily establish a through route, and can only do so when it acts in the interest of the public. When it does so act, however, any damage incidental to the nature of the business of an express company, does not render an order of the Commission unjust or unreasonable. I am unable to say that it is unjust or unreasonable to compel the American to deliver to the Southeastern express packages shipped from points north of Washington to points on the main line of the Southern Railway. The inequalities and discriminations which result from the present situation sufficiently appear from the reports of the Commission. The disadvantages which it is claimed by the American would result from a compliance with the Commission's order would be largely, if not completely, overcome by a proper division of rates.

3. The fact that the Commission did not prescribe the division of rates, but withheld that subject for further consideration, does not invalidate the order. The Commission deferred that matter until the question of its right to establish routes had been determined. This it had the right to do. Railway Co. v. United States, — U. S., [fol. 191] —, decided February 19, 1923.

I think the application for an interlocutory injunction should be denied.

[File endorsement omitted.]

[fol. 192] IN UNITED STATES DISTRICT COURT

PETITION FOR ALLOWANCE OF APPEAL BY SOUTHEATERN EXPRESS COMPANY, INTERVENING DEFENDANT AND RESPONDENT—Filed October 29, 1923

To the Honorable United States District Court, Northern District of Georgia and Northern Division thereof, and to the Honorable Samuel H. Sibley, the judge thereof; to the Honorable Special Court convened to hear and pass upon complainant's application for interlocutory injunction in the above cause, and to the Honorable Nathan P. Bryan, United States Circuit Judge; Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, the members composing said Special Court and hearing said application:

Southeastern Express Company, Intervenor, Defendant and Respondent in the above cause feeling itself aggrieved by the interlocutory order or decree rendered and entered therein on the 11th day of October, 1923, enjoining until the further hearing of the case and until the further order of the Court, the execution and enforcement of the order of the Interstate Commerce Commission set forth in the original bill of complaint, and as exhibit thereto, and which is sought by said bill to be annulled and set aside, does [fol. 193] hereby appeal therefrom to the Supreme Court of the United States for the reasons set forth in the assignment of errors which is filed herewith; and said Southeastern Express Company prays that this its appeal be allowed; that citation be issued as provided by law, and that a transcript of the record and proceedings and the papers upon which said order or decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such Court in such cases made and provided, and that such proceedings may be had as by law provided.

Petition further prays that an order touching the security to be required of it, in order to perfect its appeal, be made.

C. J. Rixey, Sanders McDaniel, Attorneys and Counsel for Southeastern Express Company, Appellant.

[File endorsement omitted.]

[fol. 194] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed October 29, 1923

Now comes Southeastern Express Company, Intervening Respondent and Appellant, by its attorneys and counsel, and in connection with its petition for appeal files the following assignment of errors upon which it will rely upon the prosecution of its appeal to the Supreme Court of the United States in the above entitled cause from the interlocutory order or decree made by the Honorable Special Court, and entered in the District Court of the United States for the Northern District of Georgia, on the 11th day of October, 1923, granting an interlocutory injunction until the further order of the Court, restraining and preventing the execution and enforcement of the order of the Interstate Commerce Commission set forth in the original Bill of Complaint, and therein attacked and sought to be annulled and set aside;

1. The Court erred in granting said interlocutory injunction:

(a) Because the grant thereof is contrary to law and to equitable principles.

(b) Because under the pleadings and evidence introduced at the interlocutory hearing, neither the Original nor Intervening Complainant was entitled to an injunction.

(c) Because under the pleadings and evidence introduced at the hearing, the Court should have held that neither the Original nor Intervening Complainant was entitled to an interlocutory injunction, and should have denied the application therefor, and overruled each and every ground presented and urged in favor of its grant

2. The Court erred in granting said interlocutory injunction be- [fol. 195] cause the order of the Interstate Commerce Commission enjoined pendente lite is a valid order, legally made, and being within the power and authority of said Commission, should not have been judicially interfered with, and its operation and effect should not have been stayed by injunctive process.

3. Because the Court erred in granting said interlocutory injunction in accordance with the views entertained by a majority of said Court, and expressed in the opinion of said majority of the Court filed with said order granting said injunction.

4. Because the Court erred in granting said interlocutory injunction pursuant to the decision and holding of a majority of said Court that said order of the Interstate Commerce Commission was beyond the statutory power and authority of said Commission; and said majority of the Court erred in so holding and deciding.

5. Because the Court erred in granting said interlocutory injunction pursuant to the decision and holding of a majority of said Court that said order of the Interstate Commerce Commission was invalid

because such order disregarded the limitation upon the power of the Commission found in Paragraph 4 of Section 15 of the Interstate Commerce Act as amended. And the majority of said Court erred in so deciding and holding.

6. Because the Court erred in granting said injunction pursuant to the opinion, decision and holding of the majority of said Court that the American Railway Express Company is a "carrier by railroad" within the meaning and intent of, and therefore entitled to the protection, of the limitation upon the power of the Interstate [fol. 196] Commerce Commission expressed in Paragraph 4 of Section 15 of the *of the* Interstate Commerce Act as amended. And said majority of the Court erred in so holding and deciding.

7. Because the majority of said Court erred in failing to hold, in accordance with the dissenting opinion of the Circuit Judge, one of the members of said Special Court, that the American Railway Express Company is not a "carrier by railroad" within the intent and meaning of Paragraph 4, Section 15 of the Interstate Commerce Act as amended, and the Court erred in failing to hold that the complainant, American Railway Express Company, was not entitled to the benefit of the limitation imposed by said Paragraph 4, Section 15 of the Interstate Commerce Act as amended; and erred in not denying the application for interlocutory injunction.

8. Because the Court, following the majority opinion, erred in holding and deciding that the words "carrier by railroad" in Paragraph 4 of Section 15 must be construed to mean a "common carrier, including express and sleeping car company, by railroad" and that said words "carrier by railroad" appearing in said Paragraph 4 of Section 15 could, therefore, reasonably be applied to express companies, and their arrangements through contracts with railroad companies for transportation over such railroad companies; and, therefore, erred in granting said injunction.

9. Because the Court erred in failing to hold and decide in accordance with the separate and dissenting opinion of the Circuit Judge, a member of said Court, that Paragraph 4 Section 15 and the expression "any carrier by railroad" therein contained does not apply to, and does not include, an express company such as the American Railway Express Company, the Complainant, which [fol. 197] neither owns nor operates a railroad or lines of railroad, but merely procures transportation through contracts with railroad companies, and that to attempt to apply to an express company the provisions of Paragraph 4 of Section 15 would be to apply to express companies language which is descriptive of railroad companies owning and operating lines of railroad; and therefore erred in not denying said interlocutory injunction.

10. Because the Court erred in granting said interlocutory injunction upon the holding and decision in the majority opinion that the Interstate Commerce Commission had improperly construed and had misapplied the law when that Commission found and held in its re-

ports accompanying and made a part of the order enjoined that an express company, such as the American Railway Express Company, was not a "carrier by railroad" within the meaning and intent of Paragraph 4 of Section 15 of the Interstate Commerce Act as amended and was not entitled to the benefit of the limitation and restriction thereby imposed.

11. Because the majority of the Court erred in its construction of the decisions and findings of the Interstate Commerce Commission upon which the order enjoined was based; in that the majority of the Court held that Section 3 of the Interstate Commerce Act as amended was not involved, and was not taken into consideration by the Commission in making its findings, reports and orders, and that consequently, the proviso with respect to Section 3 contained in Paragraph 4 of Section 15 of the Interstate Commerce Act as amended, did not come into operation, and that the order of the Interstate Commerce Commission, and the relief therein granted was not made or intended to prevent violations of said Section 3 of the Interstate Commerce Act as amended.

[fol. 198] 12. Because the majority of the Court while holding and deciding that Paragraph 4 of Section 15 of the Interstate Commerce Act as amended applies to Complainant, American Railway Express Company, nevertheless, in so doing disregarded the proviso contained in said Section expressly excepting therefrom cases falling within Section 3 of said Act, and the Court erred in enjoining the order of the Interstate Commerce Commission upon the majority holding and decision that said order of the Commission was not intended to prevent or remove unjust discrimination or undue prejudice prohibited by said Section 3; and because said majority of the Court in holding that Section 3 of the Interstate Commerce Act as amended is not involved ignores the specific findings of the Commission made in its reports, which reports were expressly made a part of the order enjoined.

13. Because the Court erred in not holding and deciding with the dissenting opinion of the Circuit Judge, a member of the Court, that the Interstate Commerce Commission, by virtue of its approval of Complainant's, American Railway Express Company, pooling arrangement, and the continuing power and duty of the Commission in connection with said pooling arrangement, in order to prevent undue restraint of competition, contrary to the public interest, had the power to pass the order enjoined for the purpose of protecting the public interest by preventing competition from being unduly restrained in contravention of law; and, therefore, erred in not denying said interlocutory injuncton.

14. Because the Court erred in not holding that Complainant, American Railway Express Company, by reason of its contracts providing for the pooling of freights and earnings of different and com-[fol. 199] peting railroads under which earnings are divided amongst the contractual railroads upon a basis other than that of individual

performance, was estopped from asserting and claiming its alleged right to long hauls under Paragraph 4 of Section 15 of the Interstate Commerce Act as amended; inasmuch as the record shows that said Complainant derives its so called long hauls solely by combining separate and competing lines of railroad through said pooling arrangements and combinations, which it is forbidden to do by Paragraph 5 of the Interstate Commerce Act as amended, and which it can only be permitted to do with the consent and approval of the Interstate Commerce Commission, which consent can only be given and which permission can only be continued, provided such pooling arrangement, contracts and combinations of rail lines be not so employed and used as to restrain unduly competition; and, therefore, erred in not denying the interlocutory injunction.

15. Because the Court erred in refusing to sustain and uphold the order of the Interstate Commerce Commission.

Wherefore, Southeastern Express Company, Appellant, prays that said order or decree granting an interlocutory injunction be reversed, annulled and set aside, and that said interlocutory injunction be dissolved to the end that the order of the Interstate Commerce Commission may become operative and effective, and for such other and further relief as may be appropriate.

C. J. Rixey, Sanders McDaniel, Attorneys and Counsel for Southeastern Express Company, Appellant.

[File endorsement omitted.]

[fol. 200] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed November 3, 1923

The foregoing petition for appeal, with assignment of errors filed therewith, having been filed and presented to the Court in this cause, as provided by law, the said petition is granted, and the appeal by the Southeastern Express Company, intervening Respondent and Appellant, from the interlocutory order made and entered in the above cause on the 11th day of October, 1923, to the Supreme Court of the United States, is allowed.

It is further ordered that citation be issued admonishing Complainant, American Railway Express Company, and Intervening Complainant, Seaboard Air Line Railway Company, to be and appear in the Supreme Court of the United States at the time to be named in said citation.

It is further ordered that a certified transcript of the record, testimony, exhibits, papers and all other proceedings on which said order or decree appealed from was made, be transmitted to said Supreme Court of the United States within the time required by law.

It is further ordered that the bond on appeal be fixed at the

sum of Five Hundred Dollars, said bond to be approved by the Judge of the District Court for the Northern District of Georgia.

This October 31st, 1923.

N. P. Bryan, United States Circuit Judge. Robert T. Ervin, United States District Judge. Sam'l H. Sibley, United States District Judge.

[fol. 201] Constituting the Special Court hearing and passing upon complainant's application for interlocutory injunction.

This October 31, 1923.

Sam'l H. Sibley, United States District Judge for the Northern District of Georgia.

[File endorsement omitted.]

[fols. 202 & 203] Bond on Appeal for $500—Approved and filed November 3, 1923; omitted in printing

---

[fol. 204] In United States District Court

Statement of Evidence to be Included in the Record of the Appeal of Southeastern Express Company in the Above Cause Prepared, Approved, and Filed to Conform to Equity Rules Numbers 75 and 76

Upon the hearing of its application for interlocutory injunction, Complainant, American Railway Express Company, introduced the following evidence:

H. S. Marx testified by affidavit as follows:

That he is General Counsel of American Railway Express Company and was present in Atlanta at the hearing of the case of the Southeastern Express Company and Southern Fisheries Association vs. American Railway Express Company, I. C. C. Docket Numbers 12784 and 12786, which hearings were had November 16th through the 19th, 1921; that the only understanding between the parties had at that hearing or at any other hearing of the above-mentioned cases as to the determination of the basis of divisions between Southeastern Express Company and American Railway Express Company is contained in the record made of such hearing as follows:

"Mr. Rixey: Mr. Examiner, there is a prayer in the complaint that the commission in this proceeding will prescribe and fix the division of any joint rates which may be ordered between the two companies. In what I am going to say, I do not mean in any way to withdraw that prayer. We stand on the complaint as filed, and

that part of it. I have talked to Mr. Alston and his associate, Mr. Marx, with reference to the feasibility and practi-bility of deferring the matter of divisions, and the inquiry into the proper basis of divisions, to a later state in this proceeding, and to the stage after the [fol. 205] Commission shall have disposed of the primary question of through rates and routes.

Exam. Woodrow: In other words, if the Commission were to decide that the Southeastern is not entitled to these joint through rates, there would be no necessity to decide what the divisions would be. Is that it?

Mr. Rixey: That was one thought. I hoped it would take another direction.

Exam. Woodrow: Of course it goes without saying, sir, but that is the reason you gentlemen have decided it would be more feasible to defer this issue until after the decision in this case?

Mr. Rixey: Yes, and for the further reason, Mr. Examiner, that after the Commission shall have determined what through routes and joint rates shall be established, it may be that the parties could agree upon the question of divisions, if that were the only question, and to that extent we might relieve the Commission of the burden of going into the division feature recognizing that this case already is of pretty wide scope, and is going to require a great deal of time and labor for final determination, and therefore it seems to us advisable to defer the question of divisions until the primary question had been determined. In making that suggestion it is with the reservation that we reserve all of the rights we have under the petition, to take up the question of divisions at the proper time.

Exam. Woodrow: Is that satisfactory to the defendants?

[fol. 206] Mr. Alston: That is satisfactory to the defendants, Mr. Examiner, but we do not want that to be understood as precluding us from introducing some evidence that may be called "financial." We feel that that will have a bearing upon the issues in the case which are not sustained by the statement which Mr. Rixey has just made, but we will offer them only to have a bearing upon the issues left remaining.

Exam. Woodrow: Of course, defendants would have the opportunity to present any testimony that they think germane to the question as to whether or not through routes should be established.

Mr. Alston: That is right.

Mr. Rixey: I understand that.

Exam. Woodrow: Since it is agreeable to the parties, the Examiner sees no reason why that plan should not be carried out.

Mr. Rixey: Then we will reserve our evidence concerning the divisions for a later state of the proceedings, in the event it should become necessary after clearing up the other questions.

Exam. Woodrow: It is practically similar to the treatment of reparation cases, in some instances.

Mr. Rixey: Having the principles first settled, and then the details to be taken up.

Exam. Woodrow: Yes."

That there was no other understanding on or off of the record in reference to the matter, and no stipulation that through routes should [fol. 207] be made effective pending the ascertainment of the basis of divisions of the rates and revenues arising from such through routes sought to be established.

H. M. Smith testified by affidavit as follows:

That he is Superintendent of the Georgia Division of the American Railway Express Company which has its headquarters in the City of Atlanta, Georgia, that he was present at the taking of testimony in the case of Southeastern Express Company and Southern Fisheries Association vs. American Railway Express Company in Atlanta, Ga. Nov. 16, 1921, and was present when Mr. C. E. Cotteril, Attorney for the Atlanta Freight Bureau and the Southern Traffic League and the Southern Fisheries Association, called Mr. Harry T. Moore of Atlanta, Georgia, to the stand as a witness, and he heard Mr. Moore give testimony as a witness in the case on behalf of the Atlanta Freight Bureau, and as Chairman of the Express Committee of the Southern Traffic League, Mr. Moore stated that he appeared by the direction of the Governors of said Southern Traffic League.

That he also saw Mr. C. E. Cotteril offer Mr. Frank D. Fant, President of the Southern Fisheries Association, as a witness in the case, and heard Fant give evidence therein under examination of Mr. Cotteril. That he has before him as he testifies the record of the evidence of the said Moore and the said Fant.

That he has also examined the brief of Charles E. Cotteril, filed in the case before the Interstate Commerce Commission on behalf of the Southern Traffic League, such brief being signed, "Charles E. Cotteril, General Counsel, Southern Traffic League. Suite: 525 Grant Bldg., Atlanta, Georgia." Such brief is entitled "Before the Interstate Commerce Commission, Southeastern Express Company vs. American Railway Express Company, Southern Fisheries Association [fol. 208] vs. American Railway Express Company, et al." The docket numbers appear on such brief in question, to-wit: Nos. 12784 and 12786, respectively. Such brief is before him as he makes this affidavit.

T. J. Anderson testified by affidavit as follows:

He lives in Fulton County, Georgia, and is President of the Fulton Market Company, a corporation under the laws of Georgia, having its principal office and place of business in said Fulton County. That Fulton Market Company is a member of the Southern Fisheries Association, and was in the years 1921 and 1922.

That Barfield Fish Company, a corporation of the State of Georgia, with its principal office and place of business in Fulton County, is also a member of Southern Fisheries Association, and that Sprayberry & Son, a partnership also of Fulton County, Georgia, doing

business in Fulton County, Georgia, (according to his information and belief) are members of Southern Fisheries Association, and were such during the year 1921 and 1922.

CHARLES A. LUTZ testified by affidavit as follows:

That he is Vice-President in Charge of Accounts of the American Railway Company, and has occupied that position continuously since the 1st day of February, 1920; that the Company carries on an express transportation business throughout the United States, and a large part of its business originates at such points as New York City, Philadelphia, Baltimore, Boston, Providence, Buffalo, Pittsburgh, Chicago, St. Paul, Denver, Portland, San Francisco and Los Angeles, and many other points in the territory in which those [fol. 209] cities mentioned are located. That a large volume of business moves from said points and the surrounding territory to points in the southeastern section of the country including the cities of Atlanta, Birmingham, Meridian, Knoxville, Richmond, Lynchburg, Danville, Raleigh, Greensboro, Spartanburg, Jacksonville, and other cities reached by railroad lines in said section. The American Railway Express Company operates over lines of railway in the southeastern section of the country, aggregating more than 30,000 miles in all, a list of which railroad lines is shown in Exhibit A.

That the express business moving into said southeastern section is greater than the outbound business therefrom. That in the New England States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut, the Company has 1563 offices. In the month of March, 1923, the business consigned from the New England offices to all points on the main line of the Southern Railway Company from Washington to and including Birmingham, Ala. consisted of 8,697 shipments with express charges amounting to $29,675.97, in the reverse direction there were 1,433 shipments with charges amounting to $10,066.88. The business from New York City to said Southern Railway points in said month consisted of 55,614 shipments with charges amounting to $83,007.71 and in the reverse direction 8,875 shipments with charges of $11,717.15. The business from the points located on the American Railway Express Company's lines between New York and Washington to said Southern Railway Company points in said month consisted of 8,559 shipments with charges amounting to $17,711.52, and in the reverse direction 2,615 shipments with charges of 112,448.97.

The total business from the points above mentioned to the points on the main line of Southern Railway from Washington to and including Birmingham, Alabama, in the month of March, 1923, consisted of 72,870 shipments with charges amounting to $130,395.20, [fol. 210] and in the opposite direction 12,923 shipments with charges of $34,233.00. The shipments and revenue above stated include all business which moved between the points mentioned whether handled exclusively by the American Railway Express Company or in joint service by that Company and the Southeastern Express Company. For instance, business to and from Atlanta,

Birmingham and other points reached by both companies but handled exclusively by the American Railway Express Company is included as well as that handled jointly by that Company and the Southeastern Express Company.

During the twelve months, April, 1922, to March, 1923, inclusive, shipments handled exclusively by the American Railway Express Company which originated at New York City consigned to Atlanta, Georgia, were 154,614, carrying express charges of $307,696.09. During the same period the business consigned from Atlanta to New York City moving exclusively over the lines of the American Railway Express Company, consisted of 23,414 shipments carrying express charges of $34,621.08. Of said business there moved in the month of March, 1923, from New York City to Atlanta 16,713 shipments with charges of $31,025.44 and from Atlanta to New York City 2,335 shipments with charges of $3,062.83. In the month of March, 1923, the total business handled from New York City to Atlanta partly over the lines of the American Railway Express Company and partly over the lines of the Southeastern Express Company was 1 shipment with express charges of $1.73 and the business so handled over the lines of both companies from Atlanta to New York City was 422 shipments with charges of $687.93. Thus the total business handled from New York City to Atlanta over all routes by both the American Railway Express Company and the Southeastern Express Company was 16,714 shipments with express charges of $31,027.17 and the total business so handled over all routes from [fol. 211] Atlanta to New York was 2,757 shipments with charges of $3,750.76.

The issued and outstanding capital stock of the American Railway Express Company is $34,642,000. It has devoted to its express operations property which cost it as follows: Real Estate and Buildings, $15,057,384.57; Equipment, such as horses, wagons, motor vehicles, office furniture safes, etc., $22,611,948.87, Material and Supplies, $2,426,509.90. A portion of said property is located as follows:

	Land & buildings	Equipment
New York, N. Y.	$4,182,522.95	$2,752,629.45
Jersey City, N. J.	903,106.78	111,339.73
Newark, N. J.	25,260.22	129,865.37
Philadelphia, Pa.	139,404.75	1,000,920.23
Baltimore, Md.	162,969.18	145,309.74
Manchester, N. H.	1,528.66	4,499.93
Burlington, Vt.	6,283.14	4,260.31
Boston, Mass.	306,727.22	675,804 54
Providence, R. I.	26,982.20	49,177.98
New Haven, Conn.	37,072.39	44,052.41
Portland, Me.	26,309.59	29,273.35
Washington, D. C.	32,524.20	242,877.76
Richmond, Va.	11,520.09	76,226.00
Atlanta, Ga.	81,361.16	197,316.97
Birmingham, Ala.	23,726.00	53,562.14

It also has substantial amounts invested in real estate, buildings and equipment at other points at which it does business, and also has the use of many valuable parcels of real estate and buildings belonging to railroad companies, over whose lines it does business. The real estate and buildings used by the Company in its business consist largely of stables, garages, warehouses and express offices and depots.

The Company has exclusive employes numbering more than 70,000 in its entire system, in addition to which it utilizes the services of about 28,000 employes who work jointly for it and for the railroad companies over which its express matter is transported. Its exclusive employes and the approximate amount of their annual compensation in the New England States are as follows:

[fol. 212] State	No. of employes	Annual compensation
Maine	428	$657,203.16
New Hampshire	232	340,135.32
Vermont	283	416,650.20
Massachusetts	3,395	5,449,158.36
Rhode Island	495	784,933.68
Connecticut	823	1,218,121.32

In the City of New York its exclusive employes number approximately 10,357 persons whose annual compensation is approximately $16,389,985.32. Its other expenses in New York amount to approximately $2,874,453.96 per annum. In the City of Boston its expenses of operation are approximately $3,322,623.72 per annum; in Philadelphia, approximately $2,827,907.28; in Atlanta, approximately $794,655.84; In Birmingham, approximately $272,035.08.

The Company owns and uses in its express business on its entire system 4,235 motor vehicles which cost it $9,514,690.91; 14,397 wagons which cost it $2,255,893.37; 13,453 horses which cost it $2,426,771.95; and also platform trucks and other equipment of great value. Some of said vehicles and horses are located as follows:

	Motor vehicles	Wagons	Horses	Cost to A. R. E. Co.
New York City	680	731	1,334	$1,966,200.90
Boston	158	268	270	470,727.95
Philadelphia	299	38	54	797,578.96
Atlanta	49	28	45	162,567.11
Birmingham	14	16	34	41,215.67

The American Railway Express Company transfers business to the Southeastern Express Company in cases where it is consigned to an exclusive point on the Southeastern Express Company's lines and in cases where substantially earlier delivery can be given consignee by use of the two line routes. During the month of March, 1923, the American transferred to the Southeastern at Washington, D. C. 2,823 shipments, the express charges on which amounted to [fol. 213] $6,347.29 of which the American Company received

$3,239.10, which shipments originated in the New England States, at New York City, and at offices on the American's lines between New York and Washington destined to Southeastern Express Company's offices located on the main line of the Southern Railway Company between Washington and Birmingham Alabama.

In the same month the American Company transferred to the Southeastern at points south of Washington 11,989 shipments originating at the places above mentioned on which the total express charges were $16,269.00, of which the American Company received $10,684.23, computed on a rate pro rate basis, i. e., on the percentages which the local first class rate to and from point of transfer bear to the aggregate of such local rates between the points where the business is carried. Had said shipments been transferred to the Southeastern at Washington, then the American Company's share, if computed on a rate pro rate basis, would have been $7,307.40 or $3,376.83 less than the American received.

There are many shipments which move exclusively over the lines of the American Company without transfer to the Southeastern. In the year ended March 31, 1923 there were 154,614 such shipments from New York City to Atlanta with charge of $307,696.09. If the American Company were required to transfer such shipments to the Southeastern at Washington the loss of revenue to that company would reach a very large amount, nevertheless, it would still be required to maintain the facilities, terminals, vehicles and employes at New York as it does now and at the same expense. Thus, while its revenue would be diminished its expenses at New York would remain the same.

(Attached to the affidavit of Witness Charles A. Lutz, as Exhibit A, and forming a part thereof, is a list of lines of railroad and mileage on which the American Railway Express Company operates in the [fol. 214] territory south of the Ohio and Potomac Rivers, and east of the Mississippi River, the total mileage operated being 33,036.19 miles which total includes the mileage of all of the railroads operating wholly or partly in the territory south of the Ohio and Potomac Rivers, and east of the Mississippi River, except the mileage of those railroads in said territory on which Southeastern Express Company operates.

The above and foregoing statement of evidence prepared under Equity Rules 75 and 76 having been presented to us, the same is hereby approved as being a true and correct condensed statement of all of the testimony of the witnesses taken at the hearing upon the application for interlocutory injunction, and is ordered filed as a part of the record.

This the 29 day of Oct., 1923.

N. P. Bryan, Circuit Judge. Robert T. Ervin, District Judge. Sam'l H. Sibley, District Judge.

Constituting the Special Court hearing and passing upon the application for interlocutory injunction.

Sam'l H. Sibley, District Judge of the United States for the Northern District of Georgia.

[fol. 215] IN UNITED STATES DISTRICT COURT

STIPULATION RE STATEMENT OF EVIDENCE—Filed November 3, 1923

We agree that the foregoing is a sufficient brief of the evidence to be included in the appeal in the above stated case. We consent that the Court may approve the same.

We waive compliance with the equity rule requiring lodgment of this statement in the Clerk's office in advance of its approval, and we waive further notice of the presentation thereof to the Court for approval.

This shall not be construed as an agreement to this method of appeal, nor as a waiver of any rights or claims of the appellees or either of them other than is herein specifically set out.

This the 29 day of October, 1923.

H. S. Marx, T. M. Cunningham, Jr., Robt. C. Alston, Attorneys for Appellee American Railway Express Company. Hollins N. Randolph, Robert S. Parker, Attorneys Appellee Seaboard Air Line Railway Company. C. J. Rixey, Sanders McDaniel, Attorneys for Appellant, Southeastern Express Company.

[File endorsement omitted.]

[fol. 216] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 5, 1923

To the United States of America, the Interstate Commerce Commission, Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association, defendants in the cause:

You are hereby notified that on the 31st day of October, 1923, the appeal of Southeastern Express Company, Intervening Respondent in the above cause, was allowed from the interlocutory order or decree made and entered in the District Court of the United States for the Northern District of Georgia, by Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, constituting a special Court, on the 11th day of October, 1923, and that the order allowing the said appeal makes the same returnable within thirty days from the date thereof.

This notice is given to you pursuant to Urgent Deficiencies Act, October 22nd, 1913. (38 U. S. Stat. L. 221.)

This the 3rd day of November, 1923.

C. J. Rixey, Sanders McDaniel, Attorneys for Southeastern Express Company, Appellant.

[fol 217] Service of a copy of the within notice is hereby admitted and acknowledged.

This the 3 day of November, 1923.

United States of America, by Blackburn Esterline, Assistant to the Solicitor General, & C. P. Goree, Assistant U. S. Attorney. The Interstate Commerce Commission, by P. J. Farrell, Solicitor for Interstate Commerce Commission. Southern Traffic League, by Chas. E. Cotterill. Atlanta Freight Bureau, by Chas. E. Cotterill. Southern Fisheries Association, by Chas. E. Cotterill.

[File endorsement omitted.]

[fol. 218] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 6, 1923

To the Honorable George M. Napier, Attorney General of the State of Georgia:

You are hereby notified that on the 31st day of October, 1923, the appeal of Southeastern Express Company, Intervening Respondent in the above cause, was allowed from the interlocutory order or decree made and entered in the District Court of the United States for the Northern District of Georgia, by Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, constituting a special Court, on the 11th day of October, 1923, and that the order allowing the said appeal makes the same returnable within thirty days from the date thereof.

This notice is given to you pursuant to Urgent Deficiencies Act, October 22nd, 1913. (38 U. S. Stat. L. 221.)

This the 5th day of November 1923.

C. J. Rixey, Sanders McDaniel, Attorneys for Southeastern Express Company, Appellant.

[fol. 219] Service of a copy of the within notice is hereby admitted and acknowledged.

This the 5th day of November, 1923.

Geo. M. Napier, Attorney General, by T. R. Gress, Asst. Attorney General of the State of Georgia.

[File endorsement omitted.]

[fol. 220] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed November 5, 1923

To Honorable O. C. Fuller, clerk of the District Court of the United States for the Northern District of Georgia, Northern Division:

Please prepare forthwith a certified transcript of the record in the above entitled cause in the appeal of Southeastern Express Company, Intervening Respondent and Appellant, from the interlocutory order or decree made by Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, (constituting the Special Court) granting an injunction pendente lite, and entered in this Court on October 11th, 1923, which record is to consist of the following:

1. The original verified bill of complaint filed by the American Railway Express Company against the United States of America, together with all the exhibits thereto attached, and the acknowledge-
[fol. 221] ments of service and notice of such bill of complaint and of the hearings to be had thereon on the part of the United States of America and the Interstate Commerce Commission.

2. Intervening petition of Seaboard Air Line Railway Company, with the exhibit attached thereto, and order of Honorable Samuel H. Sibley, United States Judge, allowing said intervention, and making said Seaboard Air Line Railway Company a party plaintiff in the cause.

3. Appearance of Honorable P. J. Farrell for Interstate Commerce Commission.

4. Intervention and answer of Interstate Commerce Commission to the bill of complaint.

5. Response of the United States of America by Honorable Clint W. Hager, United States Attorney, adopting the answer of the Interstate Commerce Commission.

6. Intervention of Southearn Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, and order of the Court allowing said intervention, and making said intervenors parties defendant in the cause.

7. Intervention of Southeastern Express Company answering bill of complaint, and order of Court allowing said intervention and the filing of said answer embodied therein, and making the intervenor a party defendant in the cause.

8. Temporary restraining order issued after hearing upon the application for interlocutory injunction by Honorable Nathan P.

[fol. 222] Bryan, United States Circuit Judge, Honorable Robert T. Erwin, United States District Judge, and Honorable Samual H. Sibley, United States District Judge, constituting the Special Court which heard the application for interlocutory injunction, such temporary restraining order having been issued on September 19th, 1923.

9. Order or decree made and entered on October 11th, 1923, by Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, constituting the Special Court, granting an interlocutory injunction.

10. Opinion of the majority of the Court filed with said order or decree of October 11th, 1923, granting an interlocutory injunction.

11. Dissenting opinion of Honorable Nathan P. Bryan, United States Circuit Judge, filed with the order or decree of October 11th, 1923, granting an interlocutory injunction.

12. Petition of Southeastern Express Company for allowance of appeal from the order or decree of October 11th, 1923, granting an interlocutory injunction, the assignments of error filed with said petition for appeal, and the order of the Judges constituting the Special Court, and order of the Judge of the District Court of the United States for the Northern District of Georgia, allowing said appeal.

13. The citation on appeal with acknowledgements of service thereon.

14. The appeal bond and order approving the same.

[fol. 223] 15. The statement of the evidence to be included in the record on appeal, the same being lodged in your office at the time of filing this præcipe, under Equity Rule 75-B, together with stipulation of counsel, acknowledgement of service, and order of Court approving such statement of the evidence.

16. This præcipe and acknowledgements of service thereon.

17. Notice of Appeal given to Honorable George M. Napier, Attorney General of the State of Georgia, with his acknowledgement of service thereon, and notice of appeal given the United States of America, the Interstate Commerce Commission, Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, together with acknowledgements of service thereon.

18. Stipulation entered into between counsel for all appellants and counsel for all appellees on November 3rd, 1923, providing that any portions of the record filed in the United States Supreme Court with appeal of Southeastern Express Company might be considered and used on appeal of United States of America and Interstate Commerce Commission also on appeal of Southern Fisheries Association, Southern Traffic League and Atlanta Freight Bureau.

C. J. Rixey, Sanders McDaniel, Attorneys for Southeastern Express Company, Appellant.

[fol. 224] Due and legal service of the within and foregoing præcipe acknowledged. Copy of same received, and all further service waived.

This November 5, 1923.

H. S. Marx, T. M. Cunningham, Jr., Robt. C. Alston, Attorneys for Appellee American Railway Express Company. Hollins N. Randolph, Robt. S. Parker, Attorneys for Appellee Seaboard Air Line Railway Company.

[File endorsement omitted.]

[fol. 225] In United States District Court

Amendment to Præcipe—Filed November 9, 1923

To the Clerk of the United States District Court for the Northern District of Georgia:

You are hereby directed to omit from the transcript of the record to be made up for the Supreme Court of the United States on appeal by Southeastern Express Company in the above case from the order or decree of October 11th, 1923, granting an interlocutory injunction, the portion of the record specified in paragraph 18 of the original præcipe filed by said Southeastern Express Company in connection with its appeal on November 5th, 1923.

C. J. Rixey, Sanders McDaniel, Attorneys for Southeastern Express Company, Appellant.

Service of the above and foregoing notice to amend by omitting specification 18 of Southeastern Express Company's præcipe acknowledged. Copy of such direction to the Clerk received.

This November 9th, 1923.

H. S. Marx, Alston, Alston, Foster & Moise, Lawton & Cunningham, Counsel for Appellee American Railway Express Company. H. N. Randolph, R. S. Parker, Counsel for Appellee Seaboard Air Line Railway Company.

[File endorsement omitted.]

[fol. 226 & 227] Citation—In usual form, showing service on Marx, Cunningham, Morton, Randolph, and Parker and filed November 3, 1923; omitted in printing

[fol. 228] UNITED STATES OF AMERICA,
Northern District of Georgia:

CLERK'S CERTIFICATE

I, Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the foregoing and attached 227 pages contains a true copy of the original record, the assignment of errors, and of all of the proceedings had, in the intervening petition of the Southeastern Express Company, in the case of American Railway Express Company, et al., Complainants, against The United States of America, et al., Defendants, as designated in the praecipe filed therein, except that the Original Citation is attached hereto in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court at Atlanta, Georgia, this the 20th day of November, A. D. 1923.

Olin C. Fuller, Clerk United States District Court for the Northern District of Georgia. (Seal of the U. S. District Court N. D. Georgia.)

Endorsed on cover: File No. 29,977. N. Georgia D. C. U. S. Term No. 667. Southeastern Express Company, appellant, vs. American Railway Express Company and Seaboard Air Line Railway Company. Filed November 30th, 1923. File No. 29,977.

Stipulated Record

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 668

SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU, AND SOUTHERN FISHERIES ASSOCIATION, APPELLANTS,

vs.

AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

FILED NOVEMBER 30, 1923

(29,978)

(29,978)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 668

SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU, AND SOUTHERN FISHERIES ASSOCIATION, APPELLANTS,

vs.

AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

INDEX

	Original	Print
Stipulation as to parts of record to be printed	1	1
Record from U. S. district court, northern district of Georgia	4	2
Petition for appeal	4	2
Order allowing appeal	162	3
Stipulation re assignment of errors and transcript of record	164	4
Assignment of errors	165	4
Notices of appeal	171	8
Bond on appeal (omitted in printing)	187	9
Præcipe for transcript of record	189	10
Amendment and supplement to præcipe for transcript of record	192	11
Citation and service (omitted in printing)	195	13
Clerk's certificate	197	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 26, 1924

[fol. 1] IN THE

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1923

No. 666

THE UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees

No. 667

SOUTHEASTERN EXPRESS COMPANY, Appellant,

v.

AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees

No. 668

SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and SOUTHERN FISHERIES ASSOCIATION, Appellants,

v.

AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees

STIPULATION FOR PRINTING—Filed February 7, 1924

Inasmuch as the transcripts (with the exception of the appeal papers) in the foregoing appeals are triplicates and in order to avoid unnecessary printing, by their respective counsel the parties stipulate:

1. In No. 667 the transcript shall be printed in full and shall stand as the printed transcript for the hearing of that appeal.

2. In No. 666 and No. 668 all parts of the transcripts preceding the petitions for appeal shall be omitted from the printing; in each the printing shall commence with and include the petition for appeal and shall embrace all documents following, except in Nos. 666 and 668 the Statement of the Evidence shall not be reprinted.

3. The printed transcript in No. 667 (minus the appeal papers [fol. 2] in that case) and the printed appeal papers in No. 666 and No. 668 shall constitute and stand as the printed transcripts for the hearing of the appeals in No. 666 and No. 668.

4. This stipulation is entered into without prejudice to the contentions of the American Railway Express Company that only one

appeal should have been taken in this matter, and all of the appellants should have been properly made parties thereto.

Blackburn Esterline, Assistant to the Solicitor General, for the United States, No. 666. P. J. Farrell, Solicitor for Interstate Commerce Commission, No. 666. Sanders McDaniel, Charles J. Rixey, Solicitors for Appellant, No. 667. Challen B. Ellis and Chas. E. Cotterill, Solicitors for Appellants, No. 668. H. S. Marx, T. M. Cunningham, Jr., Robt. C. Alston, Sols. for Am. Ry. Ex. Co. Hollins N. Randolph, Robert S. Parker, Solicitors for All Appellees.

[fol. 3] [File endorsement omitted.]

[fols. 4-160] In United States District Court

Petition for Allowance of Appeal by Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association, Intervening Defendants and Respondents—Filed October 29, 1923

To the Honorable United States District Court, Northern District of Georgia, and Northern Division thereof, and to the Honorable Samuel H. Sibley, the judge thereof; to the honorable special court convened to hear and pass upon complainant's application for interlocutory injunction in the above causes, and to the Honorable Nathan P. Bryan, United States Circuit judge; Honorable Robert T. Ervin, United States district *district* judge, and Honorable Samuel H. Sibley, United States district judge, the members composing said special court and hearing said application:

Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, Intervenors, Defendants and Respondents in the above cause, feeling themselves aggrieved by the interlocutory order or decree rendered and entered in the above styled cause on the 11th day of October, 1923, enjoining until the further hearing of the case and until the further order of the Court, the execution and enforcement of the order of the Interstate Commerce Commission set forth in the original complaint, and as exhibit thereto, and which is sought by said bill to be annulled and set aside, do hereby appeal therefrom to the Supreme Court of the United States for the [fol. 161] reasons set forth in the assignment of errors which is filed herewith; and said Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association pray that this their appeal be allowed; that citation be issued as provided by law, and that a transcript of the record and proceedings and the papers upon which said order or decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such Court in such cases made and provided, and that such proceedings may be had as by law provided.

Petitioners further pray that an order touching the security to be required of it, in order to perfect their appeal, be made.

Chas. E. Cotterill, Attorney for Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association.

[File endorsement omitted.]

[fol. 162] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed November 3, 1923

The foregoing petition for appeal, with assignment of errors filed therewith, having been filed and presented to the Court in this cause, as provided by law, the said petition is granted, and the appeal by the Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, intervening Respondents and Appellants, from the interlocutory order made and entered in the above cause on the 11th day of October, 1923, to the Supreme Court of the United States, is allowed.

It is further ordered that citation be issued admonishing Complainant, American Railway Express Company, and Intervening Complainant, Seaboard Air Line Railway Company, to be and appear in the Supreme Court of the United States at the time to be named in said citation.

It is further ordered that a certified transcript of the record, testimony, exhibits, papers and all other proceedings on which said order or decree appealed from was made, be transmitted to said Supreme Court of the United States within the time required by law.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars, said bond to be approved by the Judge of the District Court for the Northern District of Georgia.

This October 31st 1923.

N. P. Bryan, United States Circuit Judge; Robert T. Ervin, United States District Judge; Saml. H. Sibley, United States District Judge, constituting the special court hearing [fol. 163] and passing upon complainant's application for interlocutory injunction. Saml. H. Sibley, United States District Judge for the Northern District of Georgia.

[File endorsement omitted.]

[fol. 164] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

STIPULATION IN LIEU OF ASSIGNMENT OF ERRORS AND TRANSCRIPT OF RECORD—Filed October 29, 1923

In order to avoid duplication and to simplify the record on appeals in this proceeding it is stipulated that the Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, Appellants herein, may adopt as their own the assignments of error and transcript of record in such proceeding as are and may be set forth in the appeals of the United States, Interstate Commerce Commission, and Southeastern Express Company, the same as though such assignments of error and abstracts of record were set forth in such appeal of the Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association.

Oct. 25, 1923.

H. S. Marx, T. M. Cunningham, Jr., Robt. C. Alston, Counsel for American Railway Express Co. Randolph & Parker, Counsel for Seaboard Air Line Railway Co. Chas. E. Cotterill, Counsel for Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association.

[File endorsement omitted.]

[fol. 165] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed October 29, 1923

Now comes Southeastern Express Company, Intervening Respondent and Appellant, by its attorneys and counsel, and in connection with its petition for appeal files the following assignment of errors upon which it will rely upon the prosecution of its appeal to the Supreme Court of the United States in the above entitled cause from the interlocutory order or decree made by the Honorable Special Court, and entered in the District Court of the United States for the Northern District of Georgia, on the 11th day of October, 1923, granting an interlocutory injunction until the further order of the Court, restraining and preventing the execution and enforcement of the order of the Interstate Commerce Commission set forth in the original Bill of Complaint, and therein attacked and sought to be annulled and set aside:

1. The Court erred in granting said interlocutory injunction:

(a) Because the grant thereof is contrary to law and to equitable principles.

(b) Because under the pleadings and evidence introduced at the interlocutory hearing, neither the Original nor Intervening Complainant was entitled to an injunction.

(c) Because uder the pleadings and evidence introduced at the hearing, the Court should have held that neither the Original nor Intervening Complainant was entitled to an interlocutory injunction, and should have denied the application therefor, and overruled each and every ground presented and urged in favor of its grant.

2. The Court erred in granting said interlocutory injunction be- [fol. 166] cause the order of the Interstate Commerce Commission enjoined pendente lite is a valid order, legally made, and being within the power and authority of said Commission, should not have been judicially interfered with, and its operation and effect should not have been stayed by injunctive process.

3. Because the Court erred in granting said interlocutory injunction in accordance with the views entertained by a majority of said Court, and expressed in the opinion of said majority of the Court filed with said order granting said injunction.

4. Because the Court erred in granting said interlocutory injunction pursuant to the decision and holding of a majority of said Court that said order of the Interstate Commerce Commission was beyond the statutory power and authority of said Commission; and said majority of the Court erred in so holding and deciding.

5. Because the Court erred in granting said interlocutory injunction pursuant to the decision and holding of a majority of said Court that said order of the Interstate Commerce Commission was invalid because such order disregarded the limitation upon the power of the Commission found in Paragraph 4 of Section 15 of the Interstate Commerce Act as amended. And the majority of said Court erred in so deciding and holding.

6. Because the Court erred in granting said injunction pursuant to the opinion, decision and holding of the majority of said Court that the American Railway Express Company is a "carrier by railroad" within the meaning and intent of, and therefore entitled to the protection, of the limitation upon the power of the Interstate [fol. 167] Commerce Commission expressed in Paragraph 4 of Section 15 of the *of the* Interstate Commerce Act as amended. And said majority of the Court erred in so holding and deciding.

7. Because a majority of said Court erred in failing to hold, in accordance with the dissenting opinion of the Circuit Judge, one of the members of said Special Court, that the American Railway Express Company is not a "carrier by railroad" within the intent and meaning or Paragraph 4, Section 15 of the Interstate Commerce Act as amended, and the Court erred in failing to hold that the complainant, American Railway Express Company, was not entitled to the benefit of the limitation imposed by said Paragraph 4, Section 15 of

the Interstate Comerce Act as amended; and erred in not denying the application for interlocutory injunction.

8. Because the Court, following the majority opinion, erred in holding and deciding that the words "carrier by railroad" in Paragraph 4 of Section 15 must be construed to mean a "common carrier, including express and sleeping car company, by railroad" and that said words "carrier by railroad" appearing in said Paragraph 4 of Section 15 could, therefore, reasonably be applied to express companies, and their arrangements through contracts with railroad companies for transportation over such railroad companies; and, therefore, erred in granting said injunction.

9. Because the Court erred in failing to hold and decide in accordance with the separate and dissenting opinion of the Circuit Judge, a member of said Court, that Paragraph 4 Section 15 and the expression "any carrier by railroad" therein contained does not apply to, and does not include, an express company such as the American Railway Express Company, the Complainant, which neither owns [fol. 168] nor operates a railroad or lines of railroad, but merely procures transportation through contracts with railroad companies, and that to attempt to apply to an express company the provisions of Paragraph 4 of Section 15 would be to apply to express companies language which is descriptive of railroad companies owning and operating lines of railroad; and therefore erred in not denying said interlocutory injunction.

10. Because the Court erred in granting said interlocutory injunction upon the holding and decision in the majority opinion that the Interstate Commerce Commission had improperly construed and had misapplied the law when that Commission found and held in its reports accompanying and made a part of the order enjoined that an express company, such as the American Railway Express Company, was not a "carrier by railroad" within the meaning and intent of Paragraph 4 of Section 15 of the Interstate Commerce Act as amended and was not entitled to the benefit of the limitation and restriction thereby imposed.

11. Because the majority of the Court erred in its construction of the decisions and findings of the Interstate Commerce Commission upon which the order enjoined was based; in that the majority of the Court held that Section 3 of the Interstate Commerce Act as amended was not involved, and was not taken into consideration by the Commission in making its findings, reports and orders, and that consequently, the proviso with respect to Section 3 contained in Paragraph 4 of Section 15 of the Interstate Commerce Act as amended, did not come into operation, and that the order of the Interstate Commerce Commission, and the relief therein granted was not made or intended to prevent violations of said Section 3 of the Interstate Commerce Act as amended.

[fol. 169] 12. Because the majority of the Court while holding and deciding that Paragraph 4 of Section 15 of the Interstate Commerce

Act as amended applies to Complainant, American Railway Express Company, nevertheless, in so doing disregarded the proviso contained in said Section expressly excepting therefrom cases falling within Section 3 of said Act, and the Court erred in enjoining the order of the Interstate Commerce Commission upon the majority holding and decision that said order of the Commission was not intended to prevent or remove unjust discrimination or undue prejudice prohibited by said Section 3; and because said majority of the Court in holding that Section 3 of the Interstate Commerce Act as amended is not involved ignores the specific findings of the Commission made in its reports, which reports were expressly made a part of the order enjoined.

13. Because the Court erred in not holding and deciding with the dissenting opinion of the Circuit Judge, a member of the Court, that the Interstate Commerce Commission, by virture of its approval of Complainant's, American Railway Express Company, pooling arrangement, and the continuing power and duty of the Commission in connection with said pooling arrangement, in order to prevent undue restraint of competition, contrary to the public interest, had the power to pass the order enjoined for the purpose of protecting the public interest by preventing competition from being unduly restrained in contravention of law; and, therefore, erred in not denying said interlocutory injunction.

14. Because the Court erred in not holding that Complainant, American Railway Express Company, by reason of its contracts providing for the pooling of freights and earnings of different and [fol. 170] competing railroads under which earnings are divided amongst the contractual railroads upon a basis other than that of individual performance, was estopped from asserting and claiming its alleged right to long hauls under Paragraph 4 of Section 15 of the Interstate Commerce Act as amended; inasmuch as the record shows that said Complainant derives its so called long hauls solely by combining separate and competing lines of railroad through said pooling arrangements and combinations, which it is forbidden to do by Paragraph 5 of the Interstate Commerce Act as amended, and which it can only be permitted to do with the consent and approval of the Interstate Commerce Commission, which consent can only be given and which permission can only be continued, provided such pooling arrangement, contracts and combinations of rail lines be not so employed and used as to restrain unduly competition; and, therefore, erred in not denying the interlocutory injunction.

15. Because the Court erred in refusing to sustain and uphold the order of the Interstate Commerce Commission.

Wherefore, Southeastern Express Company, Appellant, prays that said order or decree granting an interlocutory injunction be reversed, annulled and set aside, and that said interlocutory injunction be dissolved to the end that the order of the Interstate Commerce Com-

mission may become operative and effective, and for such other and further relief as may be appropriate.

C. J. Rixey, Sanders McDaniel, Attorneys and Counsel for Southeastern Express Company, Appellant.

[File endorsement omitted.]

[fol. 171-183] In United States District Court

Notice of Appeal—Filed November 6, 1923

To the Honorable George M. Napier, Attorney General of the State of Georgia:

You are hereby notified that on the 31st day of October, 1923, the appeal of Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, Intervening Respondents in the above cause, was allowed from the interlocutory order or decree made and entered in the District Court of the United States for the Northern District of Georgia, by Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, constituting a special Court, on the 11th day of October, 1923, and that the order allowing the said appeal makes the same returnable within thirty days from the date thereof.

This notice is given to you pursuant to Urgent Deficiencies Act, October 22nd, 1913. (38 U. S. Stat. L. 221.)

This the 5th day of November, 1923.

Chas. E. Cotterill, Attorney for Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association.

[fol. 184] Service of a copy of the within notice is hereby admitted.

This the 5th day of November, 1923.

Geo. M. Napier, Attorney General, by T. R. Gress, Assistant Attorney General of the State of Georgia.

[File endorsement omitted.]

[fol. 185] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 3, 1923

To the United States of America, the Interstate Commerce Commission, and Southeastern Express Company, Defendants in the cause:

You are hereby notified that on the 31st day of October, 1923, the appeal of Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, Intervening Respondents in the above cause, was allowed from the interlocutory order or decree made and entered in the District Court of the United States for the Northern District of Georgia, by Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, constituting a special Court, on the 11th day of October, 1923, and that the order allowing the said appeal makes the same returnable within thirty days from the date thereof.

This notice is given to you pursuant to Urgent Deficiencies Act, October 22nd, 1923. (38 U. S. Stat. L. 221.)

This the 2nd day of November, 1923.

Chas. E. Cotterill, Attorney for Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association.

Service of a copy of the within notice is hereby admitted and acknowledged.

[fol. 186] This the 2nd day of November, 1923.

United States of America, by Blackburn Esterline, Assistant to the Solicitor General & C. P. Goree, Assistant U. S. Attorney. The Interstate Commerce Commission, by P. J. Farrell, Solicitor for Interstate Commerce Commission. Southeastern Express Company, by C. J. Rixey & Sanders McDaniel, Its Attys.

[File endorsement omitted.]

[fols. 187 & 188] BOND ON APPEAL FOR $500—Approved and filed November 3, 1923; omitted in printing.

[fol. 189] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed November 5, 1923

To Honorable O. C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, Northern Division:

Please prepare forthwith a certified transcript of the record in the above entitled cause in the appeal of Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, Intervening Respondents and Appellants, from the interlocutory order or decree made by Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, (constituting the Special Court) granting an injunction pendente lite, and entered in this Court on October 11th, 1923, which record is to consist of the following:

1. Intervention of Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, and order of the Court allowing said intervention, and making said intervenors parties defendant in the cause.

[fol. 190] 2. Order or decree made and entered on October 11th, 1923, by Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge, and Honorable Samuel H. Sibley, United States District Judge, constituting the Special Court, granting an interlocutory injunction.

3. Petition of Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association for allowance of appeal from the order or decree of October 11th, 1923, granting an interlocutory injunction, and the order of the Judges constituting the Special Court, and order of the Judge of the District Court of the United States for the Northern District of Georgia, allowing said appeal.

4. The citation on appeal with acknowledgements of service thereon.

5. The appeal bond and order approving the same.

6. This præcipe and acknowledgements of service thereon.

7. Stipulation dated October 25th, 1923, between Counsel for American Railway Express Company and for Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association permitting adoption by such Appellants of assignments of error and additional portions of record contained in appeals of United States, Interstate Commerce Commission, and Southeastern Express Company.

8. Notice of appeal given to Honorable George M. Napier, At-
[fol. 191] torney General of the State of Georgia, with his acknowledgement of service thereon, and notice of appeal given the United States of America, the Interstate Commerce Commission, Southeastern Express Company, together with acknowledgements of service thereon.

9. Stipulation entered into between counsel for all appellants and counsel for all appellees on November 3rd, 1923, providing that any portions of the record filed in the United States Supreme Court with appeal of Southeastern Express Company might be considered and used on appeal of United States of America and Interstate Commerce Commission also on appeal of Southern Fisheries Association, Southern Traffic League and Atlanta Freight Bureau.

Chas. E. Cotterill, Attorney for Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association.

Due and legal service of the within and foregoing præcipe acknowledged. Copy of same received, and all further service waived. The stipulations mentioned in items 7 and 8 above were entered into without waiver of right to object to the method of appeal.

This Nov. 5, 1923.

H. S. Marx, T. M. Cunningham, Jr., Robt. C. Alston, Attorneys for Appellees American Railway Express Company. Hollins N. Randolph, Robt. S. Parker, Attorneys for Appellees Seaboard Air Line Railway Co.

[File endorsement omitted.]

[fol. 192] IN UNITED STATES DISTRICT COURT

AMENDMENT AND SUPPLEMENT TO PRÆCIPE—Filed November 9, 1923

To the Clerk of the District Court of the United States for the Northern District of Georgia:

Come now Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association, Joint Appellants, and direct the amendment and supplement of the præcipe for record filed by them in the above styled cause on November 5th, 1923, in connection with their appeal to the Supreme Court of the United States from the order or decree of October 11th, 1923, granting an interlocutory injunction, as follows:

1. Strike from said original præcipe specification number nine.

2. Add to said præcipe the following additional specifications:

9. The original vertified bill of complaint filed by the American Railway Express Company against the United States of America, together with all of the exhibits thereto attached, and the acknowledgements of service, and notice of such bill of complaint and the hearings to be had thereon on the part of the United States of America and the Interstate Commerce Commission.

10. Intervening petition of Seaboard Air Line Railway Company, with the exhibit thereto attached and the order of Honorable Samuel H. Sibley, United States District Judge, allowing said intervention, and making said Seaboard Air Line Railway Company a party plaintiff in the cause.

11. Appearance of Honorable P. J. Farrell for Interstate Commerce Commission.

[fol. 193] 12. Intervention and answer of Interstate Commerce Commission to the bill of Complaint.

13. Response of the United States of America by Honorable Clint W. Hager, United States Attorney, adopting the answer of the Interstate Commerce Commission.

14. The original praecipe and acknowledgement of service thereon.

15. Assignments of error filed with the appeal of Southeastern Express Company which are adopted by appellants herein as is provided for in stipulation with Counsel for Appellees. Such stipulation being dated October 25th, 1923.

16. Statement of the evidence to be included in the record on appeal, the same being lodged in your office at the time of filing this amended praecipe under Equity Rule 75-B, together with stipulation of Counsel, acknowledgement of service, and order of Court approving such statement of the record.

17. This amended præcipe and supplement thereto and acknowledgement of service thereon."

Chas. E. Cotterill, Attorneys for Southern Traffic League, Atlanta Freight Bureau, & Southern Fisheries Association.

Service of the within and foregoing amended and supplemental præcipe acknowledged. Copy of the same received.

[fol. 194] This the 9th day of November, 1923.

Alston, Alston, Foster & Moise, Lawton & Cunningham, H. S. Marx, Attorneys for Appellee American Railway Express Company. H. N. Randolph, R. S. Parker, Attorneys for Appellee Seaboard Air Line Railway Company.

[File endorsement omitted.]

[fol. 195-196] [Title omitted]

CITATION—In usual form, showing service on Marx, Cunningham, Alston, Parker and Randolph; filed November 3, 1923; omitted in printing

[fol. 196½] [File endorsement omitted.]

[fol. 197] UNITED STATES OF AMERICA,
Northern District of Georgia:

CLERK'S CERTIFICATE

I, Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the foregoing and attached 196 pages contain a true copy of the original record, the assignment of errors, and of all of the proceedings had, in the intervening petition of the Southern Traffic League, the Atlanta Freight Bureau, and the Southern Fisheries Association, in the case of American Railway Express Company, et al., Complainants, against The United States of America, et al., Defendants, as designated in the præcipe filed therein, except that the Original Citation is attached hereto instead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court at Atlanta, Georgia, this the 20th day of November, A. D., 1923.

Olin C. Fuller, Clerk United States District Court for the Northern District of Georgia. (Seal U. S. District Court, N. D. Georgia.)

FILED
MAR 19 1924
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 667.

SOUTHEASTERN EXPRESS COMPANY, APPELLANT,

v.

AMERICAN RAILWAY EXPRESS COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY, APPELLEES.

Brief for Appellant, Southeastern Express Company.

SANDERS MCDANIEL,
CHARLES J. RIXEY,
Attorneys for Southeastern Express Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

	Page
PART I—STATEMENT OF THE CASE.....	1
(A) History of Proceedings Before the Interstate Commerce Commission	3
(B) The Requirements and Scope of the Order Attacked	18
(C) The Situation Which Would Result From a Compliance with the Commission's Order.	20
(D) Grounds Urged by Appellants in Lower Court Against Validity of Commission's Order	22
PART II—SPECIFICATIONS OF ERRORS RELIED UPON	24
PART III—BRIEF OF ARGUMENT	30
Point 1. The Limitation Contained in Paragraph 4 of Section 15 of the Interstate Commerce Act Upon the Power of the Commission in Respect to the Establishment of Through Routes and Joint Rates Does Not Apply to Express Companies	30
(A) This Court, and Other Courts of Last Resort, Have Held that the Term "Common Carrier by Railroad" Does Not Embrace an Express Company Which Has Its Business Transported by Railroad Under Contract	49
(B) Construction by the Commission of the Interstate Commerce Act as Bearing Upon the Question Whether the Descriptive Term "Carrier by Railroad" as Used in the Act Embraces Express Companies	54
(C) Analysis of Majority Opinion	67
Point 2. Appellee, the American Company, is Equitably Estopped from Questioning the Power of the Commission to Make the Order Attacked Upon the Ground on Which the Interlocutory Injunction was Granted	94

Page

(A) Certain Conclusions Reached and Findings Made by the Commission in Its Reports Accompaying and Made a Part of Its Order 108

Point 3. Even if Paragraph 4, Section 15, Were Applicable to an Express Company, the Facts Found by the Commission Show that Section 3 is Involved, and Its Findings Show Conclusively that the Order Made is Necessary to Prevent Undue Discrimination Condemned by Section 3 117

Point 4. Concerning the Intervention of the Seaboard Air Line Railway Company.
If this Railway Company, and Not the Express Company, is the Real Party in Interest, Then no Right Which it Legally Possesses is Invaded by the Order 153

Point 5. There Can Be No Doubt Concerning the Power of the Commission to Provide for Shipper's Routing as a Part of Its Order Establishing Through Routes and Joint Rates. 167

PART IV—PRELIMINARY STATEMENT.... 179

Having Failed to Assign Cross-Error Appellees Cannot Rely in This Court Upon Any of the Grounds Urged by Them in the Lower Court in Support of Application for Injunction and Decided Adversely to Them..... 179

(A) Contention that Order of Commission Attacked is Arbitrary and Unreasonable Was Correctly Overruled and Decided Adversely to Appellees 180

(B) The Order of the Commission Does Not Unconstitutionally Invade the Property Rights of Appellees 199

(C) The Fact That the Commission Did Not Prescribe the Divisions of the Joint Rates Ordered, but Withheld That Subject for Future Consideration, Does Not Invalidate the Order 218

CONCLUSION 222

TABLE OF CASES CITED.

Page

Akron, C. & Y. Ry. et al. v. U. S., 261 U. S. 184 . . 182, 221
Alexandria Chamber of Commerce v. M. P. R. R. Co., 53 I. C. C. 311 144
American Express Co. v. U. S., 212 U. S. 522 . . . . 36, 52
A. C. L. R. R. Co. v. North Carolina R. R. Comm., 206 U. S. 1 207
A. C. L. Ry. Co. v. Riverside Mills, 219 U. S. 186 . . . . . 207, 219, 220
Baltimore & Carolina S. S. Co. v. A. C. L. R. R., 49 I. C. C. 176 55
Brown Adm. v. United States, 113 U. S. 566 64
B. R. & P. Ry. v. Penna. Co., 29 I. C. C. 114 156
Chicago, Lake Shore & S. B. Ry. Co. v. Director General, 58 I. C. C. 647 156
Chicago & N. W. Ry. v. Ochs, 249 U. S. 416 206
Cohens v. Virginia, 6 Wheat. 264, 5 U. S., 82 64
Ex Parte No. 73, 63 I. C. C. 375 56
Ex Parte 76, Express Contract, 1920, 59 I. C. C. 518 97
Express Cases, 24 I. C. C. 381; and 28 I. C. C., 132 14, 15, 19, 31, 32, 33, 64, 65, 81, 82, 84, 89, 106, 110, 111, 121, 137, 138, 139, 140, 143, 146, 151, 152, 153, 169, 170, 171, 176, 189, 191, 192, 193, 202, 203, 204, 214.
Flour City S. S. Co. v. L. V. R. R. Co., 24 I. C. C., 179 . . . . . 155, 189
Galveston, Harrisburg, Etc., Ry. v. Wallace, 223 U. S. 481 207
Gillespie Coal Co. v. I. T. S., 62 I. C. C. 335 156
Grand Trunk Ry. v. Michigan R. R. Comm., 231 U. S. 457 . . . . . 207, 211, 212
Guaranty Status of Connecting Terminal Railroad, 72 I. C. C. 809 61
Guaranty Claim of Central Elevator & Warehouse Co., 72 I. C. C. 169 61
Higgins v. Erie R. R. Co., 89 N. J. L. 629; 99 Atl. 98 . . . . . 51, 54
Houston & Texas Ry. v. U. S., 234 U. S. 342 181

Page

In matter of Application of the Chicago, New York & Boston Refrigerator Co., for a Partial Payment under Section 209 of Transportation Act, 1920, 70 I. C. C. 575..... 59
In Re Consolidation of Express Companies, 59 I. C. C. 459 96
Interstate Comm. Comm. v. Illinois Cent. R. R., 215 U. S. 452 .....181, 182
Interstate Comm. Comm. v. Union Pacific R. R., 222 U. S., 541 .....181, 182
Interstate Comm. Comm. v. D. L. & W. R. Co., 220 U. S., 235 181
Interstate Comm. Comm. v. Northern Pacific Ry. Co., 216 U. S. 538 187
Los Angeles Switching Case, 234 U. S. 294..... 181
L. & N. R. R. Co. v. U. S., 245 U. S. 463..... 181
Lumber Rates, Oregon and Washington and Eastern Points, 29 I. C. C. 609..... 155
Lumber Rates from Texas, Louisiana & Arkansas, 28 I. C. C. 471 144
Merchants & Mfr's Ass'n v. C. R. R. of N. J., 30 I. C. C. 388 189
Mfrs. Ry. Co. et al. v. U. S., 246 U. S. 457..... 181
Michigan Central R. R. v. Michigan R. R. Comm., 236 U. S. 615 .....207, 208, 212, 220
Minis v. U. S., 15 Pet. 423 38
Missouri Pacific Ry. v. Nebraska, 217 U. S. 196.. 206
Munn v. Illinois, 94 U. S. 113 209
Nelson v. Northern Pac. Ry., 188 U. S. 108..... 64
New York Central R. R. v. U. S., 288 Fed. 951.. 220
Norfolk & Western Ry. Co. v. Dixie Tobacco Co., 228 U. S. 593 208
Northern Pacific R. R. v. North Dakota, 236 U. S. 585 206
Oklahoma Portland Cement Co. v. A. L. & G. Ry., 32 I. C. C. 221 144
Oyler & Son, et al. v. American Ry. Express Co., 83 I. C. C., 160 58
Pacific Navigation Co. v. Sou. Pacific, 31 I. C. C. 472 .....155, 157

Page

Penna. Co. v. U. S., 236 U. S. 351....157, 181, 207, 209
Penna. Co. v. U. S., 214 Fed. 445..... 157
Peoria & P. U. Railway Co. v. U. S. et al., 44 Sup. Ct. 194 180
Proctor & Gamble Co. v. U. S., 225 U. S. 282..181, 182
Proposed Increase in Express Rates, 50 I. C. C. 385 83
R. R. Comm. of Florida v. Southern Express Co., 44 I. C. C. 645 58
Railway Co. v. U. S., — U. S. —, decided February 19, 1923 219
Rates on Grain Milled in Transit at Lawrenceburg, Ind., 35 I. C. C. 27..... 144
Re Express Companies, 1 I. C. R. 677..... 35
San Antonio & Arkansas Pass. Ry. Co. v. Wagner, 241 U. S. 476 .....51, 52
Seaboard Air Line Ry. v. U. S. et al., 254 U. S. 57. 181
Skinner & Eddy Corp. v. U. S., 249 U. S., 557.... 182
Southeastern Express Co. v. American Ry. Express Co., 78 I. C. C. 126 58
Southern Indiana Express Co. v. United States Express Co. 88 Fed. Rep., 659; S. C. 92 Fed. Rep. 1022 52
Southern Pacific Co. v. Jensen, 244 U. S. 205.... 51
State ex rel. Bennett v. American Express Co., 195 Pacific 312 52
State ex rel. Great Northern Express Co. v. District Court, 142 Minnesota, 410.....51, 53
State v. Minneapolis & St. Louis R. R. et al., 83 Northwestern 60 207
Strasburg Steam Flouring Mill v. Southern Ry. Co., 38 I. C. C. 52; and 58 I. C. C. 337..... 144
St. L. S. W. Ry. et al. v. U. S. et al., 245 U. S. 136.....145, 220
Switching Charges on Coal and Coke, 32 I. C. C. 444 144
Taylor v. Wells Fargo & Co., 249 Fed. 109..... 50
Transportation of Strawberries by Express, in Carload Lots, in Passenger Trains, from Florida to Northern Markets, 81 I. C. C. 634. 59

Page

Truckers' Transfer Co. v. V. & W. C. Ry. Co., 27 I. C. C. 275 189
United States v. Alabama Great Southern R. R. Co., 142 U. S. 615 63
U. S. v. Dickson, 15 Pet. 141 39
United States v. Healey, 160 U. S. 136..... 64
U. S. v. Louisville & Nashville R. R. Co., 235 U. S. 314 181
U. S. v. Illinois Central R. R. Co., Adv. Ops., Oct. Term, 1923, Nos. 6 and 7, page 190, 68 L. Ed.. 182
United States v. Morseman, 42 Fed. Rep., 448.... 52
United States v. Philbrick, 120 U. S. 52..... 64
United States v. Union Pacific R. R. Co., 226 U. S. 61 104
Waverly Oil Works Co. v. Penna. R. R. Co., 28 I. C. C. 621 189
Wells Fargo & Co. v. Taylor, 254 U. S. 175, 49, 50, 53, 54, 61, 63, 158
Western Pacific Railroad Co. v. S. P. Co., 55 I.C.C. 71 155
Weyman v. Southard, 10 Wheat. 30 39
Wichita Falls System Joint Coal Rate Case, 25 I. C. C. 215 189
Wisconsin-Arkansas Lumber Co. v. St. L. I. M. & S. Ry. Co., 33 I. C. C. 43..... 144
Wisconsin, Minnesota & Pacific R. R. v. Jacobsen, 179 U. S. 287 .....207, 208, 212

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 667.

SOUTHEASTERN EXPRESS COMPANY, APPELLANT,

v.

AMERICAN RAILWAY EXPRESS COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY, APPELLEES.

Brief for Appellant, Southeastern Express Company.

PART I.

Statement of the Case.

This is an appeal from an order awarding an interlocutory injunction restraining the enforcement of an order made by the Interstate Commerce Commission. The suit in which the injunction was granted was instituted in the District Court of the United States for the Northern District of Georgia by the American Railway Express Company against the United States, under the provisions of the Urgent Deficiency Appro-

priations Act, October 22, 1913, C. 32, 38 Stat. L. 219, transferring jurisdiction over suits of this character from the Commerce Court to the District Court and prescribing the procedure therein.

The object of the suit was to annul and set aside a certain order made by the Interstate Commerce Commission, which order, with the two reports accompanying and made a part of the same, are exhibited with the bill of complaint (R., 17-44).*

A Special Court was organized as required by law, composed of Circuit Judge Nathan P. Bryan, and District Judges Samuel H. Sibley and Robert T. Ervin. The Interstate Commerce Commission intervened and filed an answer to the bill of complaint (R., 92). The Southern Traffic League, Atlanta Freight Bureau, and Southern Fisheries Association jointly filed an intervention and were made intervening respondents. The Southeastern Express Company likewise intervened and filed an answer to the bill of complaint (R., 101-120). The Seaboard Air Line Railway Company, over which the American Railway Express Company operates under its uniform express contract, intervened in support of the complaint and was made a party plaintiff (R., 46).

After a hearing upon the motion for an interlocutory injunction before the Special Court, organized as aforesaid, the majority of the Court held that an injunction should be granted upon the single ground hereinafter discussed. A dissenting opinion was handed down by His Honor, Judge Bryan. The two

*The references are to pages of the *printed* record.

opinions will be found in the record, the majority opinion at page 122, and the dissenting opinion at page 128.

Thereupon an order was entered on October 11, 1923, which order referred to, and made, the majority opinion a part thereof, and granted an interlocutory injunction restraining the enforcement of the order of the Interstate Commerce Commission attacked in the bill of complaint (R., 121). It is from this order that this appeal was taken direct to this Court.

Before considering the majority opinion, and the sole ground upon which the injunction was awarded, it may be well to review briefly the history of the proceedings before the Interstate Commerce Commission which resulted in the order now under review in this Court.

(A) History of Proceedings Before the Interstate Commerce Commission.

The two reports made by the Commission, and the order accompanying the same, which order was directly attacked in the bill of complaint, are reproduced as Exhibits Nos. 1, 3 and 4 with the bill (R., 17-39, 43). The proceeding before the Commission was instituted by a complaint filed by the Southeastern Express Company against the American Railway Express Company, seeking the establishment of through routes and joint rates on interstate express traffic, and asking an order requiring the American Railway Express Company to observe the designation of routing by the shipper, and also seeking the establishment of just, reasonable and equitable divisions of joint rates

between the two companies. A complaint had also been filed by the Southern Fisheries Association against both express companies, seeking relief similar to that sought in the petition filed by the Southeastern. The complaints were consolidated, and at the hearing ordered and held by the Commission, the complaint filed by the Southern Fisheries Association was treated as a petition of intervention in the case instituted by the Southeastern. The Atlanta Freight Bureau, Southern Traffic League, and other commercial organizations intervened at the hearing, and some of them offered evidence in support of the relief sought by the Southeastern.

All of these facts appear from the first report made by the Commission, 78 I. C. C. 126 (R., 17-18). It also appears from that report that the Southeastern was incorporated under the laws of Alabama in October, 1920, and commenced business on May 1, 1921. It operates under contract principally over the lines of the Southern Railway System, the Mobile & Ohio Railroad, the Tennessee Central Railroad, the Washington, Baltimore & Annapolis Railway, and Maryland & Pennsylvania Railroad, and certain other smaller roads, the total operated mileage being approximately 10,000 miles. All of its routes are in the Southern States, with the exception of that over the St. Louis-Louisville line of the Southern Railway, the route over the Washington, Baltimore & Annapolis Railway and the one over the Maryland & Pennsylvania Railroad. The service of the Southeastern, and the railroads over which it operates, reach Washington, Louisville, Cincinnati, Evansville, Cairo, St. Louis, Memphis, New Orleans and Jacksonville, and, these

points, being the principal termini of its contract roads, are referred to in the report and proceedings of the Commission as "border points."

Practically all of the other carriers in the United States have contracts with the American Railway Express Company, hereinafter referred to as the American, and the relation of that company with its contract roads is governed by what is known as its "uniform express contract," a copy of which was filed and made a part of the record with the intervening petition of the Seaboard Air Line Railway Company (R., 51). The American operates, through its uniform contract, over practically all of the railroad mileage in the United States outside of the Southern region, which is the territory south of the Ohio and Potomac Rivers and east of the Mississippi River, and in the South the American operates over approximately 30,000 miles of railroad, being competitive with the Southeastern at numerous common and junction points, and has facilities for interchange with the Southeastern at all of the border points above enumerated (R., 19).

Prior to May 1, 1921, the American operated over the routes now occupied by the Southeastern, and used those routes extensively, and, in many instances, exclusively as its preferred routes, on business passing through the above mentioned border points, such as Washington, Cincinnati, Louisville, Memphis and Jacksonville, when the American had the choice of all routes.

Before beginning business with its contract lines on May 1, 1921, the Southeastern filed with the Commis-

sion its general concurrence in all of the tariffs of the American with respect to rates and charges, rules and classifications, so as to provide for the application of the universal joint rates and routes theretofore operated under the national system of express rates promulgated by the Commission. The American would not permit this participation by the Southeastern, and by restrictive supplements, effective May 1, 1921, limited the Southeastern's general concurrence and made applicable joint rates, charges and routes only from exclusive offices of one company to exclusive offices of the other. By the term "exclusive office" is meant an office or station which is local to the lines of one of the companies and not reached by the lines of both. The term "common point," as used in the Commission's reports, applies to a station which is reached and served by both companies, and which is, therefore, competitive.

The effect of these restrictive supplements, and its method of routing and handling traffic originated by the American on and after May 1, 1921, was to close effectually the Washington gateway, as well as all other border gateways, and to prevent the use of the routes theretofore preferentially employed, and in many instances, as stated, exclusively employed by the American, over the rails of the Southern Railway System lines. On and after May 1, 1921, in lieu of the routes via Washington and the other border points and thence over the rails of the Southern Railway System, the American undertook to form and substitute express routes over other railroads which would give it the longest possible hauls on traffic destined to, or coming from, Southeastern offices, whether at common or exclusive points.

From a tariff standpoint, under the restrictive supplements filed by the American, the only joint rates available were, as stated, from the exclusive offices of one company to the exclusive offices of the other, but there were no joint through rates available between common points and the exclusive offices of either company, or between common points. Taking the main line of the Southern Railway between Washington through Atlanta to Birmingham, on which are located the offices of the Southeastern embraced within the scope of the Commission's order attacked in this proceeding, the resulting situation, under the restrictions imposed by the American through its supplements, was that there were joint through rates published between American exclusive offices north of Washington and all Southeastern exclusive offices south of Washington on the lines of the Southern Railway Company. For example, there were joint through rates via Washington between all exclusive offices of the Southeastern on the Southern Railway's main line north and south of Charlotte, North Carolina, and surrounding Charlotte on all sides, but no joint through rates were available via Washington in connection with the Southeastern to or from Charlotte. Therefore, Gastonia, North Carolina, which is situated just south of Charlotte, or Greensboro, situated north of Charlotte, could receive express traffic, if transferred to the Southeastern at Washington, under joint rates applicable via Washington, and if this traffic were transferred to the Southeastern at Washington could thus obtain the benefit of the frequent passenger-train schedules handling express out of Washington over the main line of the Southern Railway; while Charlotte, a common point, was denied the benefit of joint rates in connec-

tion with the Southeastern through Washington, and to avail itself of this service, would have to pay combination rates, which would be materially higher to or from Charlotte than the joint through rates applicable to or from Gastonia, or any other exclusive office in the vicinity of Charlotte. The same situation with respect to the absence of joint through rates to or from common points, while such rates were published to or from exclusive offices, existed throughout the extent of the line, and was found to exist at all common points, such as Spartanburg, Greenville, Gainsville and Atlanta, as compared with the exclusive offices located north and south thereof. The same situation existed on the line between Atlanta and Birmingham, in that exclusive offices on all sides of Atlanta and Birmingham, as well as on all sides of such smaller common points as Bremen, Georgia, Anniston and Pell City, Alabama, were accorded, under the tariffs, joint through rates, while the larger cities and all competitive points were denied the use of such joint rates and routes in connection with the Southeastern, with transfer between the two companies at Washington. These local stations or exclusive offices are in the same block as the contiguous common or competitive points and such common or competitive points should take the same rates as all other points in the block, under the Commission's uniform system of express rates.

However, the effect of the restrictive supplement was to accord the uniform through rates to the exclusive offices, and to deny the same to common or competitive points, so that a common point, if it wished to avail itself of the service of the South-

eastern between Washington and Atlanta, or Washington and Birmingham, on traffic destined to or coming from exclusive offices of the American north of Washington, could only do so by paying the combination of local rates on Washington, which would be materially higher than the joint through rates applicable to and from exclusive offices on either side of the common point.

This situation is pointed out in the Commission's report, 78 I. C. C., 126 at page 142 (R., 19, 32).

The joint through rates were published between exclusive offices, and there were no restrictions in the tariff limiting the rates to any particular route. This is pointed out by the Commission in its supplemental report, 81 I. C. C., at page 248—

> "From exclusive points on the line of one company to exclusive points on the line of the other company there are no restrictions in the tariffs as now published and the rates are the same regardless of the route over which the traffic moves,"

Nevertheless the American, on and after May 1, 1921, sought to, and did, control the routing of the traffic which it originated when destined to Southeastern offices so as to secure to itself, in all instances, its maximum haul, and allow the Southeastern its minimum haul. In pursuance of this plan the American undertook to close, and did close, the Washington gateway, as well as the other border gateways, so as to prevent the use of the frequent passenger train service over the main lines of the Southern Railway System to and

from these border gateways to reach points local to the Southern Railway, and thereby forced the traffic through interior transfer points and via out-of-line routes, in connection with which cross-town transfers were frequently necessary to effect interchange of the traffic between the two companies, the interchange in most instances via such routes being made at remote and unprotected interior transfer points.

The result was that in handling traffic from the East destined to Southeastern exclusive offices, instead of transferring the same to the Southeastern at Washington, where it would be interchanged through platform transfer and placed in main-line trains of the Southern Railway to move thence to destination without further interchange or interruption, the American undertook to force the traffic through such transfer points as Raleigh and Charlotte, North Carolina, or such remote points as Walnut Cove or Winston Salem, North Carolina, Spartanburg or Greenville, South Carolina. Transfers were made by the American at Atlanta, not only for points in the immediate vicinity of Atlanta on the Southern Railway System lines, but for points north of Atlanta, where the traffic, after having been brought to that city in the American's service, would have to be back-hauled by the Southeastern; and when destined to points on other divisions of the Southern Railway, held at Atlanta awaiting the departure of Southern Railway trains over such other divisions. In this way the traffic brought to Atlanta in the American's service and there transferred to the Southeastern was delayed because deprived of the close connections which would have been available between main-line and other division trains

had the traffic been handled to Atlanta in the Southeastern's service on main-line trains of Southern Railway whose schedules met and coordinated with the schedules of outbound trains from Atlanta on the various lines of the Southern Railway radiating from that city. The American, through the restrictions contained in its tariffs, denied the use of the joint service in connection with the Southeastern through Washington for traffic moving between any of its exclusive offices and a common or competitive point. While the joint rates were published as stated, without restriction, between *exclusive* offices of the two companies, the American arbitrarily declined to permit the use of such rates even under shipper's routing instructions calling for transfer of traffic to the Southeastern at Washington. It thereby closed the Washington gateway and the service of the Southeastern to and from that city to any traffic moving between the East and the South except such as the American might see proper to transfer in order to relieve itself of the responsibility for perishable or semi-perishable traffic, or where the traffic originating north of Washington, missed connection with the outbound schedules of the American from that city. Thus, at page 140 of its original report, 78 I. C. C., 126, the Commission said, concerning the refusal of the American to obey shipper's routing instructions and its disregard of the rule permitting shipper's routing, published as Rule 3 in its classification (R., 30):

> "However, the American refuses to obey shipper's routing instructions and disregards Rule 3 of the express classification. For example, a shipment from New York to Asheville, if routed via the Southeastern at Washington, was turned over

to the Southeastern, not at Washington, but at Spartanburg. The American says that the Spartanburg route was the one it used, and therefore the only 'established route,' and that since the shipper had not selected an 'established route' the routing instructions were not binding under Rule 3. The Southeastern contends that the American should obey these routing instructions. The term 'established route' must have some meaning. As the American transfers some traffic to the Southeastern at Washington for transportation to certain southeastern points, *it cannot be heard to say that there are no established routes to such points in connection with the Southeastern at Washington.* It appears, therefore, that by providing in its classification for the right of the shipper to route over established routes and declining to observe such designation of routing over established routes, *it is acting in disregard of its tariff provisions.*" (Italics ours.)

Again, at page 133 of its original report (78 I. C. C., 126), it was pointed out that (R., 23-24):

"Traffic transported over joint routes from American eastern points to exclusive Southeastern points in North Carolina and South Carolina is transferred to the Southeastern at Raleigh and Charlotte, N. C., and Spartanburg, S. C. If this traffic were transferred at Washington, it would move over the Southeastern's direct route. The American claims that it is unreasonable in view of its present service to compel it to abandon any traffic to, or to share traffic with, the Southeastern. On the same theory, the Southeastern might decline to join in through routes to or from its exclusive points unless it were given the long haul."

After reviewing certain typical schedules between New York and Atlanta, and between New York and Carolina destinations used by the American in connection with its routes through intermediate transfer points such as Raleigh, Charlotte, Spartanburg and Greenville, as compared with the frequent main-line passenger schedules which would be available were the traffic transferred to the Southeastern at Washington, a protected transfer point with ample facilities, it was found by the Commission, 78 I. C. C., at page 136 (R., 26):

> "In many cases a substantial saving of time in actual performance could be accomplished by the use of joint routes through border points or transfer points allowing the American a somewhat shorter haul. Transfers at points requiring cross-town transfer or at interior points where facilities are limited and inferior to those at larger junction points often cause delay and damage."

As stated in its original report, the record before the Commission was voluminous and the investigation which it made was painstaking and thorough. To use the Commission's language, "the record abounds in comparisons of express schedules," and "evidence was introduced respecting routes and schedules covering practically the entire territory."

After having analyzed the evidence, contrasted the routes and schedules contended for respectively by each of the companies, and having adverted to the situation resulting from the restrictions imposed by the American through its supplements to its tariffs thereby cancelling out and preventing the use of joint

rates between common points and exclusive offices, and after having shown how the practice of the American to hold the traffic in its service so as to secure its maximum haul and allow the Southeastern its minimum haul on exclusive-to-exclusive office traffic resulted in forcing the traffic through remote transfer points with inadequate facilities for interchange, the Commission, before making its specific findings in its first report, referred to and quoted at length from its decision and findings in the original *Express Cases,* 24 I. C. C., 381, and 28 I. C. C., 132, wherein it promulgated its national system of express rates under the block and zone plan. Under this uniform system of rates all express companies operated from February 1, 1914, to May 1, 1921, when the restrictive supplements issued by the American became effective. The fundamental principles announced therein are quoted repeatedly and re-affirmed in the Commission's decision in this case as controlling the situation presented upon the record and as requiring that the relief afforded by the order be granted both to meet the public necessity and convenience and to preserve such uniform system of through rates and direct routes established in the original *Express Cases* to the end that the express companies might discharge their proper functions and adequately serve the public.

After having reiterated the findings made and principles announced in the original *Express Cases,* the Commission found, in its first report in this case, among other things, 78 I. C. C., at page 140 (R., 30), that:

> "Taking all of these things into consideration and the fundamental principles laid down in our

two decisions in the *Express case,* we find as a fact that it is in the interest of the public to order established reasonably direct joint express routes."

Furthermore, in its original report in this case, after having considered at some length its findings, and after adverting briefly to the underlying purposes and objects sought to be accomplished by its decision in the *Express Cases* through the uniform system of through rates and direct routes therein required, and after having reviewed the respective contentions of the American and of the Southeastern in this case and the interpretations placed respectively by the two companies upon the decisions in the former cases, and the operation and effect of the system of rates there promulgated and prescribed, the Commission made the following findings and conclusions, 78 I. C. C., at page 143 (R., 32, 33):

"Undue prejudice is said to result from the fact that between exclusive Southeastern points and exclusive American points through routes and joint rates apply, while between nearby common points and American exclusive points a shipper has access only to the American route in the absence of proportional rates; and from the fact that some common points are accorded joint routes to and from American exclusive offices and other common points are not."

"We are of the opinion and find that it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Company and points on the lines of the Southeastern Ex-

press Company, regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established, in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Company and the other via the transfer point selected by the American Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings."

"The American should cancel its restrictive schedules and the express companies should recognize as 'established routes' the reasonable direct routes which they shall establish in accordance with our findings. Each express company, when traffic received by it is unrouted, should have the right to use the reasonable route which will give it the longest haul, but, if the express is routed via 'established routes' the routing instructions should be obeyed. The best way to provide for the establishment of routes may be for each company to have individual routing guides showing its selected routes. The shipper should then be allowed to route over any route contained in either guide."

"It should not be difficult for the express companies to decide between themselves as to what routes are or are not reasonable. They could be aided by an arbitration committee with duties similar to those of the former direct-routing committee. We can not pass upon the reasonableness of

> all routes at this time. Express schedules are constantly changing. The express companies will be given an opportunity to comply with our findings herein."

No order was entered upon this original report, and after conferences between the two express companies a written report of their inability to agree was made to the Commission (See Exhibit No. 2 with bill; R., 33). Thereupon the Commission made its supplemental report and entered the order attacked in this case (R., 39-43).

In its supplemental report, 81 I. C. C., 247, it is said, at page 249 (R., 42):

> "The reasons set forth in the original report, including testimony of record that at competitive points the express service has improved because of competition, demonstrates that the additional joint routes from American exclusive points to common points are reasonable and in the public interest."

The Commission then made the further findings and requirements, 81 I. C. C., 247 (R., 42):

> "We are of the opinion and find that it is necessary and desirable in the public interest that through routes and joint rates applicable thereto be established between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut, and New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern

Railway Company from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Company and the Southeastern Express Company at Washington, D. C.

We further find that the rates contemporaneously applicable between the above-named points over routes now used are and for the future will be just and reasonable rates for application over the routes herein prescribed.

"We further find that the tariffs should provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed."

The order attacked in this case was thereupon entered making said original and supplemental reports a part thereof, and giving effect to the requirements therein made with respect to the establishment of the additional through routes. The question concerning the establishment of additional routes between other territories via Washington or other border gateways was expressly reserved for further consideration by the Commission (81 I. C. C., 247).

(B) The Requirements and Scope of the Order Attacked.

It should be kept in mind that the order attacked in this case was made only after the most careful and painstaking investigation by the Commission with respect to the necessity for the additional routes ordered established in the public interest, and after it had examined and analyzed the service afforded over the American's preferred routes as contrasted with the service which would be available over the routes in connection with the Southeastern through Washington, and the advantage and benefits which would flow

to the public from the existence of the additional routes and their competitive service.

An analysis of the order will show that:

First, it requires routes between eastern territory and points reached by the main line of the Southern Railway from Washington through Atlanta to Birmingham to be kept open in connection with the lines of the Southeastern, with transfer to the latter at Washington, which routes were not only open, but were used preferentially in reaching and serving this territory, prior to May 1st, 1921, when the American Company had the choice of all routes.

Second, the territory on the main line of the Southern Railway between Washington through Atlanta to Birmingham is the Southeastern territory to and from which the through routes are ordered. Some of the points on the main line, such as Lynchburg, Charlotte, Spartanburg, Greenville and Atlanta being what are spoken of in the record as "common points," that is, reached by the service of both express companies, while other points—and by far the vast majority of the offices in the territory—are local to the lines of the Southern Railway and are exclusive offices of the Southeastern. It is necessary that the service of the Southeastern be employed in handling traffic between its exclusive offices and exclusive offices of the American Company north of Washington, whether the transfer be made to the Southeastern at Washington or at some point further south.

Third, said order requires the uniform joint rates prescribed in the original *Express Cases* to be con-

tinued in connection with the routes ordered, and any restrictions or limitations in the American's tariffs which would prevent the application of said rates between exclusive and common points, to be removed, the joint through rates *already* being applicable between *exclusive* offices of the two companies.

Fourth, said order further provides for transfer between the American and the Southeastern at the border transfer point of Washington, and that the tariffs shall provide for the right of the shipper to designate in writing the routing of shipments of express over the routes therein ordered.

Fifth, the order does not require that existing routes of the American, whether single line or joint, be closed or discontinued. Those routes, preferentially used by the American on traffic from its exclusive offices to the exclusive offices of the Southeastern, embrace the maximum haul which the American can secure and allow the Southeastern its minimum haul. Those routes established and used preferentially by the American will not be affected by the order. The only effect of the order is to establish additional routes in connection with the Southeastern through the border transfer of Washington, which additional routes the Commission finds to be necessary and desirable in the public interest.

(C) The Situation Which Would Result from A Compliance With the Commission's Order.

The following situation would result were the Commission's order complied with in respect to traffic between the defined territories of origin and destination covered by the order:

Between eastern points and offices of the Southeastern at common points on the main line of the Southern Railway from Washington through Atlanta to Birmingham there will be through routes and rates over the single line of the American between its exclusive offices and such common points; for example, between its exclusive offices in the East and such common points as Lynchburg, Charlotte, Spartanburg, Greenville, Atlanta and Birmingham. There will also be joint routes and through rates between exclusive American offices in the East and such common points in connection with the Southeastern through Washington; so that traffic may move either wholly over single-line routes of the American, or, under shipper's routing, it may move over the joint routes in connection with the service of the Southeastern through Washington.

There will also be available between the *exclusive offices* of the two companies in the defined territories, two sets of joint through routes, the one set being the joint through routes preferentially used by the American which afford to that company its maximum hauls and allow the Southeastern its minimum hauls; while the other set of joint routes, which would be preferentially used by the Southeastern upon traffic originated by it, would apply in connection with the Southeastern through Washington where the traffic, originated by the Southeastern at its exclusive offices or common points south of Washington, would be delivered to the American for transportation beyond, or, where traffic moving from an office of the American north of Washington in the defined territory, when specifically routed by the shipper so as to require delivery to the Southeastern at Washington, would be transferred to the

Southeastern at that gateway and transfer point. There would, therefore, be at least two available sets of routes, the one used preferentially by the American, and the other preferentially by the Southeastern, between American exclusive offices in the defined eastern territory and Southeastern exclusive offices and common points on the main line of the Southern Railway from Washington through Atlanta to Birmingham.

(D) Grounds Urged by Appellees in Lower Court Against Validity of Commission's Order.

The majority opinion thus summarizes the grounds of attack urged in the bill against the validity of the Commission's order (R., 123):

> "The American Railway Express Company contends (1) that under the order traffic originated by it in its exclusive territory north of Washington would be unnecessarily diverted from it at Washington to its competitor, thus depriving it, in many instances, of its long haul arbitrarily and unreasonably; (2) That thereby also it would be deprived of its liberty to contract and its property right in its business and the profitable conduct thereof, contrary to the Constitution; (3) That inasmuch as the additional through routes include less than the entire length of its lines between the respective termini, the order is contrary to paragraph 4 of Section 15 of the Interstate Commerce Act; (4) That the division of the joint rate not having been fixed the joint route cannot be lawfully required to be put into operation; (5) That the giving to the shipper absolute choice of routes is authorized by no statute even though the establishment of the routes themselves be validly ordered."

All members of the Special Court held against appellees on grounds numbered (1), (2) and (4) above. The majority opinion sustained the ground numbered (3), and the interlocutory injunction was granted solely on that ground, namely, that the order was beyond the statutory power of the Commission in that it was contrary to the limitation imposed by Paragraph 4 of Section 15 of the Interstate Commerce Act. Judges Sibley and Ervin did not pass upon ground numbered (5) with respect to the shipper's right to route, though these two Judges gave strong indication in the majority opinion that shippers could be accorded the right to designate routing under Paragraph 3 of Section 15 as one of the "terms and conditions" on which the routes were to be used, provided the Commission had the statutory power to establish such routes.

Circuit Judge Bryan dissented and handed down a separate opinion, wherein he held that none of the grounds upon which the order was assailed was sustainable, and that, consequently, the application for an interlocutory injunction should be denied (R., 128-133).

PART II.

Specifications of Errors Relied Upon.

The particulars in which the decree is alleged to be erroneous are set forth in detail in the assignment of errors (R., 134-137), and may be condensed and considered under the following specifications:

1. That the decree is erroneous in that the Court held and decided in accordance with the majority opinion that Paragraph 4, Section 15, of the Interstate Commerce Act, and the expression "any carrier by railroad" therein contained applies to and includes an express company such as the appellee, American Railway Express Company—

(a) Because appellee, American Railway Express Company, neither owns nor operates a railroad or lines of railroad; is neither the proprietor nor operator of a line of railroad or systems of railroad, but merely procures rail transportation through contracts with railroad companies under which express matter is transported by said railroad companies for account of said express company and for agreed compensation paid by said express company to the railroad companies so transporting.

(b) Because the term "carrier by railroad" as used in Paragraph 4 of Section 15 of the Interstate Commerce Act, as amended, does not apply, and was not intended to apply, to express companies; and, therefore, appellee, American Railway Express Company, is not entitled to the benefit of the limitation imposed by said Paragraph 4 of Section 15.

2. That, even assuming that the majority of the Court correctly held that appellee, American Railway Express Company, was a "carrier by railroad" within the meaning of Paragraph 4 of Section 15 of the Interstate Commerce Act, nevertheless the Court erred in failing to hold and decide that appellee, American Railway Express Company, could not claim or invoke the protection of such limitation, because—

(a) The uniform contract between appellee, American Railway Express Company and the railroad companies over whose lines its business is handled provides for the pooling of freights and the division of earnings, which is made unlawful except by the permission and with the continuing approval of the Interstate Commerce Commission, which approval can only be given and continued provided such pooling arrangement or consolidation does not unduly restrain competition and will be in the interest of better service to the public, Section 5 (1); and even though approved by the Commission, such pooling arrangement and consolidation can exist and continue only under such rules and regulations, and upon such terms and conditions as the Commission finds to be just and reasonable in the premises, Section 5 (2);

(b) Because the uncontroverted finding of the Commission was to the effect that better service to the public would be promoted and afforded by the establishment of the additional routes which were required by the order attacked in this proceeding and enjoined; and that competition would be unduly restrained unless the additional routes ordered were opened and kept available to shippers under routing instructions;

(c) Because, under the facts found by the Commis-

sion in its reports, made a part of the order attacked and enjoined, the Commission, under its continuing power and duty in connection with said pooling arrangement and consolidation, had ample power in order to prevent undue restraint of competition contrary to the public interest, to pass the order enjoined, thereby preventing said pooling arrangement from being illegally used in contravention of the public interest through undue restraint of competition;

(d) Because the appellee, American Railway Express Company, has no long hauls which could possibly fall within the terms of Paragraph 4 of Section 15, even if said limitation were applicable to express companies, except as acquired and created through and by said uniform express contract embodying said pooling arrangements, which contract in turn is subject to the continuing approval of the Interstate Commerce Commission for its validity, and which continuing approval can be allowed only provided said pooling arrangements be not used or employed contrary to the public interest in respect to better service and so as not to unduly restrain competition;

(e) Because appellee, American Railway Express Company, by reason of its contracts providing for the pooling of freights and earnings of different and competing railroads and for the division of earnings among the contractual railroads upon a basis other than that of individual performance, was estopped from asserting and claiming any alleged right to the protection of its long hauls under Paragraph 4, Section 15, of the Interstate Commerce Act, as amended, since by availing itself of the limitation in question and thereby preventing the opening of the routes prescribed by the order of the Commission, its pooling

arrangement and combination of rail lines would operate to unduly restrain competition and deny to the public the benefits of competitive service;

(f) Because the pooling of freights and earnings of different and competing railroads under the uniform contract between appellee, American Railway Express Company, and the railroads, though having been initially approved by the Commission, could not be permitted to continue if used or employed in violation of Paragraphs (1), (2) or (3) of Section 5 of the Interstate Commerce Act, and appellee, American Railway Express Company, is equitably estopped from claiming the benefit of the protection of Paragraph 4, Section 15, of the Interstate Commerce Act, even if the same were applicable to an express company, because, by so doing, it would use its combination of competing rail lines and its so-called long hauls, obtained, through its pooling arrangement, to unduly restrain competition and prevent the use of competitive routes which the Commission has ordered in the interest of better service to the public;

(g) Because, even if Paragraph 4 of Section 15 were applicable to express companies, appellee, American Railway Express Company, could not rely upon a technical construction of one portion of the Act to justify violations of other specific provisions of the same Act.

3. Because the majority opinion, made a part of the decree, while holding that Paragraph 4 of Section 15 applies to appellee, American Railway Express Company, nevertheless disregarded the exception with respect to Section 3 contained in said Paragraph 4 of Section 15, which exception makes said limitation in-

applicable where violations of Section 3 of the Interstate Commerce Act are involved, or would result, from the enforcement of the limitation.

4. Because said majority opinion holds and decides that said order of the Commission attacked and enjoined was not intended to prevent or remove the unjust discrimination or undue prejudice prohibited by Section 3, and thereby ignores the specific findings of the Commission made in its reports, which reports were made a part of the order enjoined.

5. Because said majority opinion, in holding that Paragraph 4 of Section 15 controlled and that Section 3 of the Act is not sought to be applied, ignored the specific findings of fact made by the Commission, and, among others, the finding that the two express companies had established and published joint through rates applicable from the exclusive offices of one company to exclusive offices of the other, which rates were unrestricted in their application and under the tariffs applied via Washington in connection with the Southeastern, as well as via the routes used preferentially by the American Company, and that under the published tariffs the shipper was given the right to designate routing, but that the American Company, where it suited its purpose so to do, was violating its published tariffs by refusing to respect shipper's routing via the Washington gateway. In this situation, and under these findings made by the Commission in this case, it was error for the Court to enjoin the order of the Commission upon the ground that it exceeded its statutory power, which order, and the reports accompanying and made a part thereof, required, *inter*

alia, that shipper's routing instructions be obeyed and that equality of treatment be accorded common points and exclusive offices in the matter of through rates and joint routes in connection with the Southeastern via Washington, and held that unless such equality of treatment obtained Section 3, as well as other provisions of the Act, would be violated.

PART III.

Brief of Argument.

Point 1.

The Limitation Contained in Paragraph 4 of Section 15 of the Interstate Commerce Act Upon the Power of the Commission in Respect to the Establishment of Through Routes and Joint Rates Does Not Apply to Express Companies.

The majority opinion, as stated, overrules all of the grounds urged by appellees to the extent pointed out in the statement of the case, and bases the grant of the interlocutory injunction solely upon the holding that an express company is a "carrier by railroad" within the meaning and intent of Paragraph 4 of Section 15.

Before analyzing the majority opinion and pointing out what we conceive to be the erroneous reasoning and conclusion therein found as to the single ground upon which the grant of the interlocutory injunction was based, it may be well to examine and consider other provisions of the Interstate Commerce Act, and particularly the use throughout the Act of the broad and comprehensive term "common carrier" in certain sections and the more restricted or specific term "carrier by railroad" in other sections.

Paragraph 3 of Section 15 of the Interstate Commerce Act, as amended on February 28, 1920, expressly confers upon the Commission power to prescribe and establish through routes, joint classifications and joint rates, as well as the divisions thereof, and the terms and conditions under which such

through routes shall be operated as between any common carriers subject to the Act, whether by railroad, express, or otherwise. After thus broadly conferring plenary power upon the Commission, Paragraph 4 of Section 15 as it now exists contains this limitation:

> "(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a waterline), require any *carrier by railroad*, without its consent, to embrace in such route substantially less than the entire length of *its railroad* and of any intermediate *railroad operated in conjunction and under a common management or control therewith*, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established" (Italics ours).

It was claimed by the appellees that this limitation upon the power of the Commission applies not merely to carriers owning and operating railroads, but to express companies, and the majority of the Special Court so held. It is, therefore, asserted that the Commission is without power to order the uniform system of express rates, which it inaugurated and which was in effect prior to May 1st, 1921, restored and made applicable over the joint routes it ordered established between the two express companies by the order attacked and enjoined, since to do so might compel the American to forego its long hauls under shipper's routing.

A similar contention was made by the express companies in the proceedings known as the *Express Cases*,

24 I. C. C., 380, and 28 I. C. C., 132, where it was broadly contended that the Commission could not prescribe or make effective the uniform system of express rates therein promulgated, because to do so would require express companies to forego their long hauls and unite with other lines in joint routes, but such contention did not there prevail. It may be seriously doubted whether the limitation upon the power of the Commission to establish through routes, under Section 15, as that limitation appeared in the Act to Regulate Commerce when the original *Express Cases* were decided, could be appealed to or relied upon by the express carriers, but it is very clear, under the present Act, which became effective February 28, 1920, that carriers by express are not included, and were not intended to be included, within the protection of this limitation. The provisions embodying this limitation as they appeared in the Act of 1910 and as they appear in the present Act are reproduced below in parallel columns:

Sub-section 4 of Section 15 Amended Interstate Commerce Act, effective March 1, 1920.	Act to Regulate Commerce, Section 15, as Amended June 18th, 1910.
(4) In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established.	And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

The limitation in Paragraph 4 of Section 15 of the present Act clearly does not apply to express companies, but only to *carriers by railroad.* In this connection, note the use of the words "carrier by railroad," which do not appear in the former Act. Besides, the former, as well as the present Act, refers to "*the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, etc.*" The use of the significant terms "length of its railroad" and of an "intermediate railroad operated, etc.," clearly shows that express companies were not intended to be included within the limitation contained in either the former or the present Act, as express companies do not *own or operate railroads.* (See comment upon the significance of these terms in dissenting opinion of Judge Bryan, R., 131).

The substitution in the new Act of the words "carrier by railroad" for the more comprehensive term "any company," appearing in the former Act, was evidently made to remove any possible question which might arise by reason of the use of the term "any company" in the former Act, and any possible doubt that the limitation was confined to railroads.

Subsequent to the amendment of June 18, 1910, the Commission had promulgated its decision in the *Express Cases, supra,* wherein a national system of express rates was inaugurated under a plan which provided a uniform system of through rates applicable via all reasonable routes and disregarded the separate units and selfish interests of independent express companies. The express companies were there-

by compelled, under this uniform system, to combine their routes under through rates, and it frequently occurred that certain express companies would have to forego their long hauls in order to make the uniform through rates effective and workable. This national system of uniform through rates necessarily disregarded this limitation, and such system could not have been made effective, as the Commission intended and required it should be, had such limitation been applied to express companies. Evidently, therefore, the Commission was of the opinion that the limitation embodied in the *former* Act did not apply to express companies when it made its decision in the *Express Cases;* and certainly whatever doubt there may have been under the language of the former Act, such doubt has been removed by the change in the language made by the amendment of March 1, 1920, and appearing in the present Act, wherein the limitation is specifically confined to "carriers by railroad," which terms, construed in connection with the further context, exclude beyond all question express companies from the protection of such limitation. It certainly will not be assumed that there was not a legislative purpose in changing the language, nor can it be assumed that the substitution for the word "company" appearing in the old Act, of the phrase "carrier by railroad" in the present Act, is without significance and was inadvertently or loosely made by Congress, or for any other reason than to make indisputable the purpose of Congress to restrict the application of the limitation to railroads.

Shortly after the passage of the first Act to Regulate Commerce, the Interstate Commerce Commission

ordered and conducted an investigation of the express companies. The opinion of the Commission in this investigation is reported under the title *Re Express Companies*, in 1 I. C. R., 677, the decision having been rendered on December 25, 1887. The express companies took the position in that investigation that under the wording of the original Act, and the first section thereof as it then stood, the express companies were not subject to the Act. They contended that they were not within the descriptive terms of the Act; that while express companies employed railroad transportation under contracts with railroads, they did not transport wholly by railroad, but used other facilities, thus seeking to distinguish carriers by railroad from carriers by express. They urged that, had Congress intended to include express companies within the provisions of the Act, it would not have used language describing railroad companies only or aptly descriptive of the operations of railroads, but would have embraced express companies specifically by name, as had been done in other legislation. The Commission, as a result of the investigation, sustained the distinction made by the express companies between railroads and carriers by express, and held that the latter were not embraced in the terms of the original Act and recommended to Congress that additional legislation be passed specifically making common carriers by express subject to the Act. The subject was then laid before Congress in the annual report of the Commission, but it was not until the passage of the Hepburn Act in 1906 that the law was so amended as specifically to confer jurisdiction upon the Commission over express companies. This was done by enlarging the first section of the Act to provide that:

> "The term 'common carrier' as used in this Act, shall include * * * express companies, etc."

Thereby, that class of carriers was explicitly declared to be subject to the Act and the jurisdiction of the Commission. (See Hepburn Act, June 29, 1906, Chapter 3591, Section 1, 34 Stat. L. 584). See also *American Express Co.* v. *U. S.*, 212 U. S., 522, at pages 532-3. In that case this Court called attention to the construction placed upon the original Act by the Commission when it held that express companies were not synonymous or identical with railroads, which construction was also acted upon by Congress in passing the Hepburn Act in 1906. The Court, in the case last cited, mentioned that express companies were brought under the Interstate Commerce Act by virtue of the passage of the Hepburn Act, and that, while made subject to the broad provisions of Section 1, as amended, conferring jurisdiction upon the Commission, subsequent provisions of the Act, by the context of the language employed, limited the application of particular sections to railroads and excluded express companies, or limited the application thereof to carriers of passengers, and excluded both express and railroad freight transportation.

From 1906 to the present time the Interstate Commerce Act has expressly conferred jurisdiction over express companies upon the Commission. The provision contained in Section 1 of the present Act, Paragraph 3, is as follows:

> "The term 'common carrier' as used in this Act shall include all pipe-line companies, tele-

graph, telephone and cable companies operating by wire of wireless; express companies; sleeping car companies, etc."

And it is therein further provided:

"Wherever the word 'carrier' is used in this Act it shall be held to mean 'common carrier.' "

The same section defines the term "railroad" as follows:

"The term 'railroad' as used in this Act shall include all bridges, car floats, lighters and ferries used by or operated in connection with any railroad, and also all the road in use by *any common carrier operating a railroad,* whether owned or operated under a contract, agreement or lease, and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." (Italics ours.)

Clearly, under the provisions of Paragraph 3 of Section 1, an express company is made subject to the provisions of the Interstate Commerce Act and the jurisdiction of the Commission under that Act.

Reference has already been made to the plenary power conferred upon the Commission by Section 15 with respect to the establishment of through routes and joint rates whenever such action is deemed by the Commission to be necessary or desirable in the public interest, and that the grant of this power is made to

apply over "any common carrier or carriers subject to the Act." The *limitation* upon the exercise of the power, which limitation is found in Paragraph 4 of Section 15, employs the restrictive or distinctive designation "carrier by railroad," and this limitation not only employs these distinctive words but refers to lines of railroad owned or operated by such carrier, terms which, under reasonable construction, cannot be applied to express companies. The plenary power conferred to establish through routes and joint rates, and the mandatory provision that this power *shall* be exercised whenever the Commission deems it necessary or desirable in the public interest to establish such through routes and joint rates between any "common carriers subject to the Act" certainly cannot, and should not, be cut down or limited by giving any broader construction to the restriction or limitation contained in Paragraph 4 than its terms plainly require. As just stated, the language employed in said Paragraph 4 confines the limitation therein imposed to "carriers by railroad," and refers specifically to carriers owning or operating lines of railroad.

Since the limitation or proviso in Paragraph 4 of Section 15 is intended to cut down and restrict the general powers granted by Congress to the Interstate Commerce Commission, and to make exceptions thereto, such limitation must be strictly construed and confined to the exceptions plainly made by its terms, which terms cannot be extended by implication or by strained construction.

Mr. Justice Story, in *Minis* v. *U. S.*, 15 Pet., 423, said:

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

In *Weyman* v. *Southard*, 10 Wheat. 30, Chief Justice Marshall said:

> "The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or, in some measure to modify the enacting clause."

Mr. Justice Story, in *U. S.* v. *Dickson*, 15 Pet. 141, at page 165, clearly expressed the principle here asserted, as follows:

> "We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, *that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.*" (Italics ours.)

Throughout the various sections of the present Act the words "carrier by railroad" are used in connection with physical operation and control, including the distribution of cars and equipment. Such restrictive or

limited designation "carrier by railroad" is carefully employed where the particular provision or section in which it is used relates to physical railroad operation, or where such provision is peculiarly applicable to railroads and not to other classes of common carriers. In other words, the term "carrier by railroad" is uniformly used, not only designedly and aptly, but in a restrictive sense, as designating a particular class of carriers; whereas in other provisions or sections of the Act dealing with the broad general powers of the Commission or duties of common carriers, the broad designation "carriers," or "common carriers" is employed. For example, as illustrative of the selective use of the term "carrier by railroad" in the sections dealing with physical operation, note the following:

In Paragraphs 10 to 14 of Section 1, concerning "car service" as defined in the Act; that is, the use, control, supply, movement, distribution, exchange and interchange of cars and equipment used in the physical transportation of property, *carriers by railroad* are specifically and alone referred to.

Paragraph 12 of Section 1 declares it to be "the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it."

Paragraph 11 of Section 1 makes it "the duty of every carrier by railroad, subject to this Act, to furnish safe and adequate car service, etc."

In Paragraph 13 of Section 1 it is provided that "the Commission is hereby authorized by general or special

orders to require all carriers by railroad, subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service."

By Paragraph 14 of Section 1 the Commission is empowered to establish rules and regulations and practices "with respect to car service by carriers by railroad, subject to this Act."

Therefore, throughout the provisions of the Act dealing with car service, the term "carrier by railroad" is employed.

Section 25 concerns the quotation of rates and issuance of through bills of lading on export traffic moving in foreign commerce. The context of the section shows that the inland rail service is that provided by carriers owning and operating railroads and the designation employed is "carrier by railroad."

Section 26 empowers the Commission, after investigation, to order any "carrier by railroad, subject to this Act," to install automatic train stop or train control devices or other safety appliances, upon the whole or any part of its railroad.

Again, in Paragraph 18 of Section 1, requiring a certificate of convenience and necessity before undertaking new construction or the extension of a line of railroad, on the one hand, or the abandonment of all or any portion of a line of railroad or the operation thereof, on the other, the words of designation are "carrier by railroad"; and in Paragraph 21 of Section 1 the

Commission is empowered to require by order "any carrier by railroad, subject to this Act, to provide itself with safe and adequate facilities for performing as a common carrier its car service * * * and to extend its line or lines."

In the sections of the Act of broader scope, the more comprehensive designation "common carrier, subject to the Act" is used.

Turning now to the provisions of broader scope, wherein the broad designation "common carrier, subject to the Act" is employed, reference may be made to the following sections:

Section 1, defining the duties of carriers with reference to furnishing transportation and establishment of just and reasonable rates, through routes and reasonable through rates, employs the designation "common carriers, subject to the Act."

Likewise, Sections 2, 3, 4, 5, 6, 7, 8, 9 and 10 refer specifically to "common carriers, subject to the provisions of this Act"; except that in Paragraph 2 of Section 4 the language "carriers by railroad" again appears and is advisedly used in connection with the prohibition against advancing rates which have been reduced by a carrier by railroad in competition with a water route or routes, except upon the conditions therein mentioned.

The authority conferred by Section 12 is declared to be over all "common carriers, subject to the Act"; likewise the provisions of Section 13 concerning in-

vestigations, complaints, hearings and procedure, refer specifically to "common carriers, subject to the Act."

Section 15 confers very comprehensive powers and very important duties upon the Commission concerning the determination of rates, classifications, regulations and practices of "any common carrier or carriers, subject to this Act," including jurisdiction and control over either individual or joint rates, fares or charges, with ample power to fix and determine the maximum or minimum rate to be charged or collected "by any common carrier or carriers, subject to this Act."

As already pointed out, by Paragraph 3 of Section 15 the Commission is given plenary power, and it is declared that it shall be its duty "whenever deemed by it to be necessary or desirable in the public interest so to do, to establish through routes, joint classifications and joint rates, fares or charges, applicable to the transportation of passengers or property * * * and the divisions of such rates, fares or charges and the terms and conditions under which such through routes shall be operated."

The power and jurisdiction expressly conferred, and the duties imposed by these provisions of Section 15, are declared to be over, and to relate to, "any common carrier or carriers, subject to this Act."

The only limitation or restriction placed upon these broader powers relates:

First: To the establishment of through routes and joint rates between street electric passenger railways and railroads of a different character; and,

Secondly: The limitation contained in Paragraph 4 which forbids (except as provided in Section 3, and except where one of the carriers is a water line), compelling any *carrier by railroad,* without its consent, to embrace in any such through route substantially less than the entire length of *its railroad,* and of any intermediate *railroad* operated in conjunction and under a *common management* or *control* therewith, which lies between the termini of such proposed through route.

In the grant of power in Paragraph 3 of Section 15, in defining therein the jurisdiction and duties of the Commission, the broad designation "any common carrier or carriers, subject to the Act" is employed.

In the limitation upon the exercise of this power, the distinctive designation "carrier by railroad" is used, and the limitation not only employs these distinctive words but specifically refers to lines of railroad owned or operated by such carrier; terms which cannot be applied to express companies.

The plenary power conferred to establish through routes and joint rates, and the mandatory requirement that this power *shall* be exercised, whenever the Commission deems it to be necessary or desirable in the public interest to establish such through routes and joint rates between any common carriers subject to the Act, cannot be cut down or limited by giving any broader construction to Paragraph 4 than its terms

plainly require; and, as repeatedly stated, the language employed in Paragraph 4 confines the limitation therein imposed to carriers by railroad and refers specifically to carriers owning, or operating by other means of control, lines of railroad.

Section 15(a) contains the rule for rate-making and requires that the Commission shall so adjust the rates, fares and charges of railroads as a whole, or as a whole in each rate group, that the net railway operating income as applied to the aggregate value of the railway property will yield the return prescribed. It also embodies a provision with respect to the recapture of earnings, and provides for the creation of what is termed the general railroad contingent fund and for loans to carriers from such contingent fund. Throughout this section, which came into the law as an entirely new section through the Transportation Act of 1920, the term "carrier" is used. In the first paragraph of Section 15(a) it was found necessary to define the term "carrier" as used throughout that particular section and its various subdivisions, which entire section was, as stated, new legislation added through the Transportation Act of 1920 (See Section 422, Transportation Act, 1920, Fed. Stat. Ann., 1920 Sup. p. 110).

The context of what now appears as Section 15(a) clearly excludes from its provisions the wire companies and pipe line companies, because none of the terms of said Section 15(a) could possibly be applicable, under the language employed, to wire companies or to pipe lines. As some of the terms employed in the various sub-sections were susceptible of the construction that the term "carrier" embraced express

companies and the Pullman Company, and since the term "carrier" as defined in Paragraph 3 of Section 1 of the Act broadly, for the purposes of the Act, was declared there to include express companies and sleeping car companies, and it being the purpose of Congress to limit the provisions of Section 15(a) to steam railroads, in defining the term "carrier" as appearing in that particular section, it was therefore, declared to apply to carriers by railroad, but not to include sleeping car companies or express companies.

It is perfectly manifest that in Paragraph 1 of Section 15(a) Congress was defining the term "carrier" as used in that section, and was *not* undertaking to define the term "carrier by railroad." In judging as to which of the terms the exclusion in this particular section of the Act relates, we are obliged to conclude that it was the *term which was being defined*, to-wit, "carrier," and was equivalent to saying that the term "carrier" shall mean "carrier by railroad" but shall *not* include express companies or the Pullman Company, for the purposes of this section.

The exclusion in this section was a part of the definition; the term being defined was "carrier"; and, therefore, the exclusion was from the term "carrier," and the terms of exclusion could not be interpreted either as an express or implied recognition on the part of Congress that the term "carrier by railroad" embraced express companies or sleeping car companies.

That the construction here contended for with respect to the definition of the term "carrier" in Section 15(a) is correct, and that such definition cannot be in-

terpreted as defining "carrier by railroad" to include express companies, is amply sustained by reference to other provisions of the Transportation Act. For example, the guaranty section, Section 209 of the Transportation Act of 1920, which provided the guaranty to carriers after the termination of federal control, defined the term "carrier" as therein employed to mean:

> "(1) A carrier by railroad or partly by railroad and partly by water whose railroad or system of transportation is under federal control at the time federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under federal control; and
>
> "(2) A sleeping car company whose system of transportation is under federal control at the time federal control terminates."

Manifestly, "carrier by railroad" as used in defining the term "carrier" did not include sleeping car companies, nor did it embrace express companies, because in the very same section, as Paragraph (i), Congress inserted a provision specifically referring to the American Railway Express Company, and providing that if that company should file its acceptance of the provisions of said section, on or before March 15, 1920, it should be entitled to the benefit thereof.

Clearly, had express companies been embraced within the term "carrier by railroad" as used in Paragraph (a) of Section 209 in defining the term "carrier," then it would not have been necessary to add a separate provision specifying that the American Company should be entitled to the benefits of said section and

the guaranty therein provided upon filing, within the time specified, its acceptance of the terms and provisions of the law granting such guaranty.

But even more pointed than this is the language of the Transportation Act, Section 300, concerning disputes between carriers and their employes and subordinate officials, and creating the Labor Board. The first paragraph of Section 300 of the Transportation Act so creating the Labor Board is as follows:

> "Sec. 300. When used in this title—
> (1) The term 'carrier' includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Here is a clear recognition that the term "carrier by railroad" does not embrace an express company or sleeping car company, and that such term, "carrier by railroad," means the owner or operator of a railroad.

It is evident from an examination of the several sections of the present Act that Congress employed the term "carrier by railroad" in the various sections in which it appears purposely and because the provisions of those sections relate particularly to railroad operation, or because it was designed to confine the provisions of those sections to the class of carriers owning and operating railroads. In other words, the terms "common carrier, subject to the Act" and "carrier by railroad" are not synonymous and were not interchangeably or indiscriminately employed.

(A) This Court, and Other Courts of Last Resort, Have Held That the Term "Common Carrier by Railroad" Does Not Embrace an Express Company Which Has Its Business Transported by a Railroad Under Contract.

The Employers' Liability Act, applicable according to its terms to "every common carrier by railroad engaging in interstate commerce," has been held by this Court not to apply to an express company which has its business transported by a railroad under the usual form of contract between railroads and express companies.

Wells Fargo & Company v. *Taylor*, 254 U. S., 175.

In that case an express messenger of Wells Fargo & Company, a common carrier by express, was injured through the derailment of an express car, in which he was working, and which was a part of a passenger train moving over the railroad of the St. Louis & San Francisco Railroad Company in the State of Mississippi—the derailment resulting from negligence on the part of the railroad company and its employes. The express company conducted its express business over the railroad mentioned under the usual form of contract between express companies and rail carriers. There was also a contract between the express messenger and the express company, spoken of as a messenger agreement, in which it was stipulated as a term or condition of the employment that neither the express company nor the railroad company should, under any circumstances, be liable for any injury which the messenger might receive while on the railroad company's train as such messenger.

The Employers' Liability Act provides in substance that "every common carrier by railroad" shall be liable in damages for the injury or death of any of its employes occurring while it is engaged and he is employed in interstate commerce, and resulting in whole or in part from the negligence of any of its officers, agents or employes, or from any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, etc.; and in Section 5 it is declared that any contract whereby a common carrier exempts itself from "any liability created by this Act" shall to that extent be void.

The Circuit Court of Appeals reversed the District Court and put its decision squarely on the ground that the express company was a "common carrier by railroad" within the meaning of the Employers' Liability Act, and, therefore, under Section 5 of that Act, the messenger agreement and the release therein contained were void.

Taylor v. *Wells Fargo & Company,* 249 Fed., 109.

This Court, however, reversed this decision of the Circuit Court of Appeals, and squarely held that an express company was not "a common carrier by railroad" within the meaning or subject to the provisions of the Employers' Liability Act.

Wells Fargo & Company v. *Taylor, supra.*

In disposing of this question, and after having stated the pertinent provisions of the Employers' Liability Act, this Court said, at page 187:

"As respects the express company, it appears not merely that Taylor was in its employ, but also that the injuries were received while it was engaged and he was employed in interstate commerce; and so the question is presented whether the act embraces a *common carrier by express which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown.* The District Court answered the question in the negative and the Circuit Court of Appeals in the affirmative. A negative answer also has been given in a like situation by the Court of Errors and Appeals of New Jersey (*Higgins* v. *Erie R. R. Co.,* 89 N. J. L. 629); and a recent decision by the Supreme Court of Minnesota makes persuasively for that view. *State ex rel. Great Northern Express Company* v. *District Court,* 142 Minnesota, 410." (Italics ours.)

And, in the following language, the Court squarely held (254 U. S., at pages 187, 188) that an express company was not "a common carrier by railroad":

"In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 212-213); by the obvious reference in the latter part of Sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aran-*

sas Pass. Ry. Co. v. *Wagner,* 241 U. S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads, but not express companies doing business as here shown.

1 I. C. C. 349; *United States* v. *Morsman,* 42 Fed. Rep. 448; *Southern Indiana Express Co.* v. *United States Express Co.,* 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co.* v. *United States,* 212 U. S. 522, 531, 534."

"As Taylor was not an employee of the railroad company and the express company was not within the Employers' Liability Act, it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement."

This decision was followed, and the same ruling was made, in *State ex rel. Bennett* v. *American Express Company,* 195 Pacific 312.

In the *Wells Fargo Case, supra,* it was not only held that an express company is not within the Employers' Liability Act, but that the words "a common carrier by railroad" as used therein mean one who owns or operates a railroad. It is stated that "the question is presented whether the Act embraces a common carrier by express which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown." The pivotal point was whether an express company, operating under the usual form of contract over a railroad could be con-

sidered "a common carrier by railroad" within the meaning of that Act, and it was squarely held that it could not be so regarded or considered.

There is a clear line of distinction between the ownership and physical operation of a railroad, the rolling stock and equipment, the maintenance of tracks and roadbed; in other words, the physical operation of lines of railroad on the one hand, and the conduct of a carriage business by an express company, on the other, which company contracts with and employs the carrier by railroad to furnish the rail transportation.

This distinction is not only emphasized in the *Wells Fargo case, supra* but it is likewise clearly pointed out in the *Minnesota case,* therein cited, *State ex rel. Great Northern Express Company* v. *District Court,* 142 Minn., 410, 172 N. W., 310, where the question was whether an express company fell within the terms of the *exception* from the Workmen's Compensation Act, which exception provided that—

> "This act shall not be construed or held to apply to any common carrier by steam rail road."

The Supreme Court of Minnesota said, in holding that an express company was not a "common carrier by railro[illegible]"—

> "It is clear that the defendant Express Company is a common carrier, but it neither owns nor operates a railroad of any kind. Its employes are not subject the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Sections 8657-8665). It has exclusive control over its employes. In transacting business it avails it-

> self of the various railroads in its territory as a means of shipping express, paying stated rates therefor. We do not think it can be said that the appellant is, within the meaning of the law, a common carrier by railroad. Higgins v. Erie Ry. Co. et al., 89 N. J., Law, 629, 99 Atl. 98. Evidently the legislative purpose of the amendment was to prescribe a rule exempting carriers having to do with the operation of railroads by steam. We hold that the defendant was within and subject to the provisions of the act."

A similar holding was made by the Court of Errors and Appeals of New Jersey with respect to the question whether an express company was a "common carrier by railroad" within the terms and meaning of the Federal Employers' Liability Act.

Higgins v. *Erie R. R. Co.*, 89 N. J. L. 629, 99 Atl. 98.

(B) Construction by the Commission of the Interstate Commerce Act as Bearing Upon the Question Whether the Descriptive Term "Carrier by Railroad" as Used in the Act Embraces Express Companies.

In holding that an express company was not a "common carrier by railroad" within the meaning of the limitation contained in Paragraph 4 of Section 15, the Commission, in its original report in this case, 78 I. C. C., at page 130, after quoting from the opinion of this Court in the *Wells Fargo case, supra,* said:

> "The express company does not own or operate lines of railroad. In its business *the separate lines of each railroad are not observed,* but by contract the express company operates as a unit over the lines of the various companies. Section 15 (4) by its terms refers to 'carriers by rail-

road,' and does not include express companies. *Nor can it be said that the principle there announced should be applied to express companies.*" (Italics ours.)

"It is our conclusion that the provisions of paragraph (4) of section 15 do not apply to express companies, and it is unnecessary to discuss cases cited in which the courts, and this commission have applied the law in dealing with routes established and connections required to be made between 'carriers by railroad.'"

Even prior to the amendment of February 28, 1920, and speaking of the former Act and the limitation therein contained in Paragraph 4 of Section 15, the Commission said, in *Baltimore & Carolina S. S. Co.* v. *A. C. L. R. R.*, 49 I. C. C., 176, at page 184:

"The limitation in Section 15 refers specifically to railroads and apparently was intended to insure to the originating rail line as large a share as possible of the movement of freight by rail."

The Commission further said that the limitation should not be enlarged or projected into other sections or provisions of the Act, so as to force a shipper to move his property by rail when he wished to send it a part of the way by water, or wished to use rail-and-water routes in preference to all-rail routes. In other words, that the application of the limitation was not to be extended or enlarged by construction or interpretation.

Another case of interest in this connection is the decision and report of the Commission construing the meaning and application of the words "carrier by railroad" used in Section 3, Paragraph 2.

Paragraph 2 of Section 3 of the Act prohibits "a carrier by railroad" from delivering freight until charges are paid, except under such rules and regulations as the Commission may, from time to time, prescribe to assure prompt payment of the railroads' rates and charges and to prevent unjust discrimination. It will be noted that the language employed is "carrier by railroad." In its report, 57 I. C. C., 591, the Commission prescribed the rules and regulations under this section, and fixed 96 hours as the maximum time for which the carriers by railroad should extend credit. The question then arose as to whether, where freight was transported partly by railroad and partly by water but delivered by the water carrier, or handled by a carrier by water controlled by a railroad line, the traffic fell within the prohibition of said Paragraph 2 of Section 3 and was subject to the regulations prescribed by the Commission governing the extension of credit, etc.

In its subsequent report, *Ex Parte* No. 73, 63 I. C. C., 375, the Commission held that the extension of credit, and the manner of collecting freight charges as controlled by Paragraph (2) of Section 3 were not *applicable* to freight moving wholly or partly by water, when delivery or relinquishment of possession at destination was effected by or through the water line, but that the extension of credit on freight moving under such circumstances by carriers subject to the Act was a practice which might be controlled under other general provisions of the Act. The Commission said, with respect to the contention that the words "carrier by railroad" might be given the broader construction so as to include the transportation where

it was partly or wholly by water and the water line made delivery at destination, at page 376:

> "It is urged on behalf of the Association of Railway Executives that the interstate commerce act extends to transportation of property partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; and that while the provisions as to the extension of credit in paragraph (2), section 3, apply only to carriers 'by railroad' it would result in an anomalous situation to hold that the provisions regarding credit apply only to transportation by railroad and not to transportation by water in connection with a railroad when both are used under a common control, management, or arrangement for a continuous carriage or shipment.
>
> "Section 2, paragraph (1) of section 3, and paragraph (1) of section 4, apply to 'any common carrier subject to the provisions of this Act.' Paragraph (2), section 4, is applicable to 'a carrier by railroad.' *Similar illustrations showing that some provisions of the act apply to all carriers subject thereto, and other provisions only to a certain class of carriers could be pointed out in other sections.* We are constrained to find that paragraph (2), section 3, is inapplicable to freight transported wholly or partly by water when delivery or relinquishment of possession at destination is effected by or through the water line, but we have control over the extension of credit in such circumstances under other general provisions of the act." (Italics ours.)

In that case the all-rail lines falling strictly within the provisions of Paragraph 2 of Section 3 were at a serious disadvantage as compared with the rail-and-water routes if the latter were not subject to such

restrictions. Nevertheless, the Commission held that the argument of convenience or hardship could not prevail, and that the restrictive words contained in Paragraph 2 of Section 3, to-wit, "carrier by railroad" could not be construed to go beyond their plain meaning and embrace other classes of carriers or other classes of transportation, although such other class of carriers was within the jurisdiction of the Commission and subject to other provisions of the Interstate Commerce Act.

In construing and applying the provisions of the Act with respect to car service, the Commission has held that the words "carrier by railroad" used therein do not include an express company, and that the provisions covering car service could not be enforced against, or applied to, express companies. See, for example, *Oyler & Son, et al.* v. *American Railway Express Co.*, 83 I. C. C., 160, where it was said, at page 162:

> "In *R. R. Commissioners of Florida* v. *Southern Express Co.*, 44 I. C. C., 645, 649, we found that we were without authority to require the carriers to acquire refrigerator cars for use in express service. Although the law has been changed since that decision, the provision of the interstate commerce act under which we may require common carriers to equip themselves with adequate facilities for performing their car service applies only to common carriers *by railroad*. In the instant proceeding the express company is the sole defendant. In *Southeastern Express Co.* v. *American Ry. Express Co.*, 78 I. C. C., 126, 129, in construing another section of the act we held that the express company is not a carrier by railroad. We reach the same conclusion here."

See also the case entitled *Transportation of Strawberries By Express, in Carload Lots, in Passenger Trains, from Florida to Northern Markets,* 81 I. C. C., 634, wherein the American Railway Express Company took the position that the Commission had no power to compel it to acquire additional equipment.

The guaranty provisions as embodied in Section 209 of the Transportation Act, 1920 (41 Stat. L. 464), were construed by the Commission in Finance Docket No. 383, *In the Matter of the Application of the Chicago, New York and Boston Refrigerator Company for a Partial Payment under Section 209 of the Transportation Act,* 1920, 70 I. C. C., 575. See, also, 71, I. C. C. 7.

Section 209 defines the term "carrier" as used in that section to mean:

> "(1) A carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under federal control at the time federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under federal control; and
>
> "(2) A sleeping car company, etc."

The Chicago, New York and Boston Refrigerator Company, a corporation doing business under the trade name of New York Despatch Refrigerator Line, and National Despatch Refrigerator Line, claimed the benefit of the guaranty section and sought partial payment of the amount which it claimed under Section 209. Thereupon the question arose as to whether the Despatch Refrigerator Line was a "common carrier by

railroad'' within the meaning of Paragraph (a) of Section 209, defining the term ''carrier'' to mean ''a carrier by railroad or partly by railroad and partly by water.'' The claimants' property was under federal control. It had filed a statement accepting all the provisions of Section 209, and was otherwise entitled to the benefit thereof, provided the Commission held it to be a ''carrier by railroad'' within the meaning of that section. The Commission denied the claim and held that, while the Despatch Company was engaged in transporting property over lines of railroad in its cars, and while its capital stock was owned entirely by the Grand Trunk Railway Company, and while its cars were handled under contract with the railways and earned a mileage allowance called ''car hire'' and claimant received in addition thereto a stipulated percentage of the revenues on such traffic, called ''commission,'' nevertheless claimant did not own or control any motive power, roadbed or track, and did not control its cars while in trains moving over lines of railroad, did not collect its compensation direct from shippers, and in other respects lacked many essential characteristics of a carrier by railroad.

The similarity between the operations of an express company and the Despatch Refrigerator Line is at once apparent; and, while it is true that an express company does publish its tariffs and collects its charges direct from shippers, whereas the Despatch Company received its compensation in the shape of car hire and commission from the railroad lines, nevertheless the Despatch Company owns and supplies its own equipment, while the contrary is true in the case of an express company, and both classes of carriers are en-

gaged, the one as a forwarder of express, and the other as a forwarder of freight, in having property entrusted to their service transported over lines of railroad by contracts with railroad lines. The Commission's decision in this case squarely holds that the Despatch Company, while doing a freight forwarding business and having property transported over lines of railroad, was not "a carrier by railroad" within the meaning of Section 209, in that it did not own or operate motive power, roadbed or tracks, and did not perform other functions incident to railroad operation. In denying the claim the report cites the case of *Wells Fargo* v. *Taylor, supra,* as fortifying the construction which the Commission had placed on the term "carrier by railroad."

See also *Guaranty Claim of Central Elevator & Warehouse Company,* 72 I. C. C., 169, and *Guaranty Status of Connecting Terminal Railroad,* 72 I. C. C., 809.

It is obvious that, while express companies procure, through contracts, transportation over railroads, they do not by this means *become railroads.* It would seem further to be simple to understand that there is a marked difference between the proprietor and operator of a railroad and a common carrier which by contract secures the transportation of traffic entrusted to it as an express company over a railroad. There is neither mystery nor subtlety involved in the holding by the Commission and by the courts that the term "common carrier by railroad," can be used in a context so as to require the Commission and the courts to hold that the owner or proprietor of a railroad

company is dealt with, and not a carrier of an independent class which contracts for transportation over a line of railroad.

The mere fact that an express company procures the carriage of its traffic over a railroad under contract by no means makes it a common carrier by railroad within the meaning of the limitation imposed by Paragraph 4 of Section 15 upon the power of the Commission to establish through routes and joint rates.

Terms which may be used to describe the character of, and means by which, an express company conducts its business, do not necessarily or even argumentatively describe its individual person when its amenability to, or exemption from, regulatory particulars is being considered.

We have thus painstakingly traced the construction which the Commission has placed upon the term "carrier by railroad" as used in different portions of the Interstate Commerce Act for the purpose of demonstrating that invariably that tribunal has confined the term to the *owner, proprietor* or *operator* of railroads, and has never undertaken to exercise over express companies and other companies, not owning or operating railroads, the powers and control vested in it by Congress where the grant of power used the specific term "carrier by railroad." For example, in the matter of car service, the issuance and regulation of securities, the matter of requiring certificates of public convenience and necessity before beginning operation or upon abandoning operation, etc.

We thus have an unbroken and invariable construction as to the meaning of the term "carrier by rail-

road'' on the part of the Commission, as well as acquiescence in such construction by express companies and other carriers similarly situated which do not own or operate lines of railroad. In fact, in some of the cases cited, express companies received the benefits of the Commission's construction as to the meaning of the term ''carrier by railroad,'' and should said term be enlarged, it is manifest that the system of regulation adopted and followed by the Commission up to this time would have to be overturned and a completely different system devised and instituted by that body with respect to express companies and other companies which do not own or operate lines of railroad.

In adopting the contruction referred to, the Commission, we respectfully insist, followed the legislative construction evidenced by the action of Congress in passing the Hepburn Act in 1906, and also followed the decision of this Court in *Wells Fargo & Company* v. *Taylor, supra.* This departmental construction is entitled to the utmost weight in this case, especially when a contrary construction of the term ''carrier by railroad'' as used in Paragraph 4 of Section 15 would cut down and limit the powers conferred upon the Commission by Section 15 over through routes and joint rates.

In the case of *United States* v. *Alabama Great Southern R. R. Co.,* 142 U. S., 615, the Court, in the opinion on page 621, says:

> ''We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a

> construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

Even as far back as the case of *Cohens* v. *Virginia*, 6 Wheat. 264, at page 418, Chief Justice Marshall, in referring to contemporaneous construction, said:

> "Great weight has always been attached, and very rightly attached, to contemporaneous exposition."

See also:

> *United States* v. *Philbrick*, 120 U. S. 52;
> *Brown Adm.* v. *United States*, 113 U. S. 566;
> *United States* v. *Healey*, 160 U. S. 136;
> *Nelson* v. *Northern Pacific Ry.*, 188 U. S. 108, 140.

In addition to the foregoing, we find the Commission, in 1912—only two years after the passage of the amendment of June, 1910—acting upon the construction for which we contend. The Commission, in the *Express Cases, supra,* in establishing the present system of express rates, unified the express companies for the purpose of giving effect to the system of through rates then inaugurated, and in so doing man-

ifestly construed the provisions of Paragraph 4 of Section 15 as having no application whatever to express companies; and this, too, at a time when the language of the limitation was not so strong in excluding express companies as the present provision of the law. This construction was accepted and acted upon by the express companies, and so far as we have been able to find was never questioned until the American Company, in 1921, raised the issue.

That the express companies were treated as a unit and their separate entities disregarded for the purpose of making applicable and workable the national system of express rates promulgated and prescribed in the original *Express Cases*, 24 I. C. C., 380, and 28 I. C. C., 132, has been repeatedly recognized and stated by the Commission, and is reaffirmed by its decision in this case where, after referring to and quoting from its decision in the original *Express Cases*, the Commission said, 78 I. C. C., at page 139 (R., 28-29):

> "It was the purpose to treat all express companies as a unit forming one national express system, to have express move over direct routes, and to make the same rate applicable thereto regardless of the route over which it moved. It was in the public interest for the express business to receive treatment similar to the mail service. Under the rates, rules and regulations prescribed in these opinions the express companies prospered. * * * The fundamental principles laid down in the *Express Cases* were prescribed at a time when there were 11 express companies. They should be followed now. The fact that we expected express companies to establish the most direct routes regardless of their long haul, is shown by the fol-

lowing quotation taken from the first opinion, *supra*, page 411:

> "'We have said to these carriers in connection with the discussion of the establishment of through routes and rates that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own line, and that division shall be agreed upon which shall compensate the originating carrier for its sacrifice.'"

Therefore, to make its system of rates under the block and zone plan workable, it was necessary to treat, and the Commission did treat, the express companies as a unit, and under that system of rates no express company was permitted to close routes in order to obtain long hauls, its equities in long hauls being taken care of in the matter of divisions. Manifestly, since the very foundation of the system of rates contemplated the freest possible movement of traffic, and that the rates should be applicable from point to point via all reasonably direct routes, the limitation imposed by Paragraph 4 of Section 15 as it stood in the Act of 1910, could not have been applied, and was not applied, to express companies. It would indeed be a strained construction to apply the present limitation to express companies. The act has been amended so as more certainly to exclude express companies, and confine the limitation to "carriers by railroad," that is to say, to common carriers owning and operating lines of railroad. It can scarcely be contended that at this late date the Commission's power should be cut down and

its system of uniform through rates and routes destroyed by arbitrarily construing the term "carrier by railroad" now appearing in Paragraph 4 of Section 15 of the present Act to mean express companies as well as railroads, especially when the context of Paragraph 4 so clearly imports carriers owning, operating and managing lines of railroad.

(C) Analysis of Majority Opinion.

Inasmuch as the decree granting the interlocutory injunction here appealed from explicitly states (R., 122), that such decree is made in accordance with the views expressed in an opinion filed therewith by the majority of the Court, it becomes at once pertinent and essential to consider such opinion, and the views therein expressed, as the order made by the Court, though signed by all three judges, is distinctly based upon a single ground which, in the opinion of the majority of the Special Court, required the grant of the injunction. The legality and propriety of the order, therefore, depends upon the soundness of the views of the majority in dealing with the sole ground upon which they base the order. In other words, while Circuit Judge Bryan signs the order as a member of the Special Court, he dissents from the views expressed by the majority upon the question of proper statutory construction, which construction by the majority furnishes the sole support for the injunction, and in his dissent Circuit Judge Bryan expressly holds that the appellees were not entitled to an injunction. If the majority of the Court erroneously construed Paragraph 4 of Section 15 of the Interstate Commerce Act, and the proper construction is that placed thereon by

Circuit Judge Bryan and the Commission, then the order must fall.

We shall, however, go further and undertake to show that, even if the majority of the Court were right in their construction of Paragraph 4 of Section 15 and correctly held that the American came within the limitation therein contained, nevertheless for other reasons the injunction should have been denied. Certain it is, from this record, that if the majority of the Court were wrong in their construction of Paragraph 4 of Section 15 the interlocutory injunction should have been denied, since all of the judges unanimously hold that the appellees were not entitled to an injunction on any other ground than than upon which the majority of the Court based its grant.

The majority opinion holds that the order attacked should be enjoined solely because, under their construction of Paragraph 4 of Section 15, the words "carrier by railroad" include an express company such as the American; while the Commission construed Paragraph 4 of Section 15 as confined to "carriers by railroad," that is to say, those owning and operating railroads, and as not applying to express companies which neither own nor operate lines of railroad. The majority opinion holds that but for the fact that the Commission's order transgresses the limitation imposed by Paragraph 4 of Section 15, as that limitation was construed by the majority, it would be otherwise valid. It will be noted that, while basing their conclusion that the order should be enjoined solely on the Court's construction of Paragraph 4, and its holding that "carrier by railroad" as therein used should be

interpreted to include an express company, in the majority *opinion* there is contained an express reservation that the interlocutory injunction granted shall be:

> "without prejudice to the right of the Commission to enquire whether, because the existing routes are unreasonably long or for other cause particularly appearing, any of the proposed new routes can be established consistently with Paragraph 4 of Section 15 of the Interstate Commerce Act, and if so to order their establishment" (R., 127, 128).

While the *order* provides that the interlocutory injunction shall be—

> "without prejudice, nevertheless, to the right of the Commission to make further enquiry and to establish such through routes in the territory involved as shall be within the exceptions and provisos of Paragraph 4 of Section 15 of the Interstate Commerce Act, and not in conflict with the prohibitions of said paragraph of said Section as set forth in the opinion and judgment of this Court" (R., 122).

The majority opinion also states that "Section 3 is not sought to be applied," and manifestly overlooks the fact that the Commission has made specific findings which would sustain its order even though Paragraph 4 of Section 15, imposing the limitation, applied to express companies. The error into which the majority of the Court has fallen in this respect will be considered more fully in a subsequent section of this brief. We desire at this time to analyze the reasoning employed by the majority in holding that Paragraph 4 of Section 15 must be interpreted to apply to express companies.

The entire line of reasoning begins with the proposition that when the original Act to Regulate Commerce was amended by the Hepburn Act of 1906 to bring express companies within the jurisdiction of the Commission, that purpose was accomplished by defining the term "carrier" and by declaring that the term "common carrier" as used therein should include express companies and sleeping car companies. (Hepburn Act of June 29, 1906, 34 Stat. L. 584.)

In the majority opinion it is said, after referring to this amendment (R., 124):

> "to bring express and sleeping car companies within it (meaning the Act to Regulate Commerce), it proceeded to *define the term* 'carrier' otherwise than it had been construed by the Commission. The enactment was that the term 'Common carrier as used in this Act *shall include* express companies and sleeping car companies.' This was a *legislative reversal of previous construction*, whether by Commission, Courts or public." (Italics ours.)

The opinion then proceeds and declares—

> "Effect must be given to it by making the term include those companies whenever used in the Act and its amendments."

Due to the fact that the Hepburn Act of June 29, 1906, contained the provision that—

> "The term 'common carrier' as used in this Act shall include express companies and sleeping car companies,"

the Court reached the conclusion, as just shown, that this "was a legislative reversal of previous construction, whether by Commission, Courts or public." It is then declared in the language just quoted that "effect must be given to it by translating the term to include those companies whenever used in the Act and its amendments, and that—

> "by so doing the words of the first Section must read 'common carriers including express companies and sleeping car companies engaged in the transportation of passengers or property wholly by railroad, etc.' "

In making this transposition from Paragraph 3, Section 1, to the first paragraph of Section 1, the Court uses the structure of the *present Act* and loses sight of what the situation would have been had the transposition been made and the same process followed using the form in which the Act to Regulate Commerce stood immediately after being amended by the Hepburn Act in 1906, bearing in mind that the Court centers upon the proposition that the so-called legislative definition of "common carrier" to include express companies was made by the Hepburn Act.

If we attempt to apply this requirement to the Act to Regulate Commerce, as amended by the Hepburn Act itself, and wherever the term "common carrier" is used in the first section thereof, to construe such term according to what the majority says is "a legislative construction," we arrive at the conclusion that those engaged in the transportation of oil or other commodity by pipe line, or partly by pipe line and partly by railroad, shall be considered and held to be

"common carriers, including express companies and sleeping car companies, within the meaning and purposes of said Act." By applying literally the rule of construction which the Court said must be applied, and which it undertook to apply, to Section 1 of the present Act, to Section 1 of the Act to Regulate Commerce, as amended by the Hepburn Act, that section would read, in part, as follows:

> "Sec. 1. That the provisions of this Act shall apply to any corporation, or any person or persons engaged in the transportation of oil or other commodity * * * by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers ('including express companies and sleeping car companies') within the meaning and purposes of this Act."
>
> (Hepburn Act of June 29, 1906, ch. 3595, Sec. 1, 34 Stat. L. 584).

Obviously the significance which the majority opinion attaches to the difference in the method by which pipe line carriers were brought under the Act, and the manner in which express companies and sleeping car companies were declared to be subject to its terms and provisions, loses all force when we attempt to do what the majority opinion says must be done, namely, substitute for the words "common carrier" wherever appearing in the Act the broader definition "common carrier, including express companies and sleeping car companies."

Attention will presently be asked to the fact, admitted in the majority opinion, that in many provi-

sions of the Interstate Commerce Act, where the term "carrier by railroad" appears, such provisions could not possibly be applied to an express company. However, without regard to where this may lead, the majority declares that effect must be given to what is termed the "new definition" of "common carrier" so as to make that term, whenever used in the Act and its amendments, apply to express companies as well as sleeping car companies. It is then stated (R., 125):

> "By so doing the words of the first section must read 'common carriers including express companies and sleeping car companies engaged in the transportation of passengers or property wholly by railroad, etc.' Thereby *such* express companies as carry property *by railroad* and *such* sleeping car companies as carry passengers *by railroad,* and only such, are made subject to the Act."

Apparently by combining the two propositions, namely, (1) that "common carrier" as used in the Act shall include express companies and sleeping car companies, which definition appeared for the first time in the Hepburn amendment of June 29, 1906, and (2) the language found in the opening paragraph of the present Interstate Commerce Act, to-wit, "that the provisions of this Act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, etc.," the majority felt themselves compelled to conclude that Section 1 as thus supplemented was tantamount to a declaration that express companies are "common carriers by railroad." In other words, the majority opinion construes the pertinent portion of the Hepburn amend-

ment, which for the first time brought express companies within the jurisdiction of the Commission, as being nothing more than a *new definition* of the term "common carrier," as first used in the original Act to Regulate Commerce. The purpose of Congress in enacting this part of the amendment of 1906 was clearly to enlarge the law by bringing new subjects under the regulatory powers of the Commission. The majority of the lower Court, however, it would seem, conceived the legislative purpose to have been to correct the construction which had theretofore been placed on Section 1 of the original Commerce Act, and to redefine the meaning of the term "common carrier" therein employed, or, as the opinion puts it (R., 124):

> "But to bring express and sleeping car companies within it, it proceeded to *define the term* 'carrier' otherwise than it had been construed by the Commission."

Instead of construing the action of Congress as expanding the scope of the Act, and for the important purpose of enlarging the jurisdiction of the Commission by bringing new subjects thereunder, the opinion of the majority of the Court indicates belief that such action was for the sole purpose of correcting previous misconstruction by the Commission and the Courts.

Having reached the conclusion that the action of Congress in June, 1906, is to be interpreted as a legislative definition of the term "carrier" as including express companies and sleeping car companies, the next step in the process of reasoning is that, since "common carrier" appears in the opening section of

the present Act, it can be translated to mean "common carriers including express companies and sleeping car companies engaged in the transportation of passengers or property wholly by railroad, etc." (R., 125); and that, therefore, transposing the term "common carrier" as defined in Paragraph 3 of Section 1 of the present Act to the opening sentence of Section 1, it is found that the provisions of the Act apply to common carriers including express companies transporting property by railroad, and hence the conclusion of the majority that an express company is a "common carrier by railroad" and that wherever the term "common carrier by railroad" appears in the Act, that term must be construed to include express companies and sleeping car companies. However, in so attempting to expand the term "carrier by railroad" found in different provisions of the Act, the majority of the Court apparently are driven to the recognition of the fact that many of the sections using the term "carrier by railroad" plainly show by their context that Congress could never have intended to include express companies, or to make them subject to such sections or provisions. Thus, it is stated in the majority opinion (R., 126):

> "It must be admitted that there are portions of the Act that cannot be *applied* to express and sleeping car companies, though they are 'carriers by railroad' or 'carriers subject to this Act' as the case may be. Thus requirements as to passenger service cannot be applied to express companies because they do not carry passengers, nor can those as to freight be applied to sleeping car companies for like reason; nor can those relating to engines, switches and tracks or train operations apply to either, because neither has them."

If it be admitted that the term "carrier by railroad" in any section of the Interstate Commerce Act is used advisedly and for the specific designation of railroads owning and operating their lines, can it be said that Congress did not use the term "carrier by railroad" aptly, designedly and deliberately in every section in which the term appears? Then too, if it be admitted that the context of certain sections should be looked to in order to determine whether "carrier by railroad" is confined to what the majority of the Court says "is now a common and *prima facie* meaning of the expression," that is to say, "to carriers owning and operating railroads" (R., 124), how can the context of Paragraph 4 of Section 15 be disregarded without doing unjustifiable violence to the plain meaning of the terms used, such as "*the entire length of its railroad and of any intermediate railroad operated under a common management or control therewith?*" Where else in the Act can stronger terms importing railroad ownership, management and control be found, and who can contend that terms unmistakably importing ownership, management and control of railroads can be, with any degree of accuracy or aptness, applied to an express company?

As forcibly put by Judge Bryan in his dissenting opinion (R., 131):

> "The expression 'any carrier by railroad' in section 15 (4) is limited and qualified by the language, 'the entire length of its railroad and of any intermediate railroad operated in conjunction or under a common management therewith,' etc. But it is insisted that the limitation and qualification are intended to designate user instead of

ownership. That construction, as it appears to me, cannot possibly include 'any intermediate railroad operated under a common management or control' with the first named railroad. *What we are asked to do is to apply to an express company language which is descriptive only of a railroad company.* Express companies as such do not have intermediate railroads upon a route under their management or control, separately or in connection with others. Section 15 (3) grants the power to establish through routes, 'applicable to the transportation of passengers or property,' as therefore applicable to *both railroad companies and express companies.* But the limitation in 15 (4) applies only to *railroad companies;* as they usually, and not inadvertently, are referred to in the act, and further indicates that the term 'carrier by railroad' is employed in the usual, and not in a exceptional sense, by recognizing a common practice of consolidations of lines of railroads by railroad companies,—a practice which never has been, and could not be, indulged in by express companies.' (Italics ours.)

The theory of the majority of the Special Court seems to be that, in drafting the provision of the Hepburn Act which contained the declaration that the term "common carrier" should include express companies and sleeping car companies, Congress was not enacting *new matter* but was merely *redefining old matter.* If this view is accepted, is not the conclusion inevitable that the definition, worked out by the majority of the Court, to wit, "common carriers engaged in the transportation of passengers or property wholly by railroad, etc.," was found to be so general and all-embracing that it was necessary for a new term of designation or definition to be employed and the term "carrier by railroad" came into different sections of

the present Act with a specific meaning so as to differentiate carriers owning and operating railroads from other carriers subject to the Act? Otherwise, why the careful selection and apt use of the term "carrier by railroad" in those sections which the majority opinion concedes could have reference only to carriers owning and operating lines of railroad? We respectfully suggest that the term "carrier by railroad" is meant to be an abbreviation of the term "carriers owning or operating railroads," and is not an abbreviation, as the majority of the Court state, of Paragraph (1), (a) of Section 1 of the Act.

The comprehensive designation "common carrier, subject to the Act" is likewise aptly used in connection with the general grant of power to the Commission in prescribing the duties and various phases of regulation applicable generally to all common carriers subject to the Act engaged in the transportation of passengers or property.

At times, the more comprehensive term "carrier subject to the Act" is aptly used in one part or section; whereas the more restricted term, "carrier by railroad" is used in another subdivision or paragraph of the same section. For example, in Section 4, containing the long-and-short-haul provision, Paragraph 1 uses the term "any common carrier subject to the provisions of this Act," while Paragraph 2 of the same section provides that wherever "a carrier by railroad shall, in competition with a water route or routes, reduce the rates on the carriage of any species of freight to or from competitive points, etc." The latter term "carrier by railroad" was evidently purposely used

because it frequently occurs that *railroads* in competition with water lines often find it necessary to reduce *freight* rates to meet the water-line competition, notably the trans-continental rail lines in competition with the coast-to-coast steamship lines operating through the Panama Canal; but such competitive conditions are not encountered by express companies, and express companies in the past have not attempted to raise or lower express rates on account of rates available by boat lines which handle slow freight upon which the competition is with the freight service of the railroads, and not with the expedited express service.

When we turn to Section 15 it is evident that express companies are clearly within the terms of Paragraph 3 of that section conferring plenary power upon the Commission to establish through routes and joint rates, and the terms and conditions under which through routes shall be operated. The only limitation upon this power, necessary here to be noted, is that found in Paragraph 4 of Section 15, where, as pointed out, not only is the term "carrier by railroad" employed, but wherein the context clearly indicates that the limitation is confined to carriers owning and operating lines of railroad. Nowhere in the majority opinion do we find any satisfactory or convincing reason why the term "carrier by railroad" should not be given its commonly accepted meaning and interpreted as it is usually employed to designate carriers owning and operating railroads, especially when the context plainly indicates that the limitation is to apply solely to this particular class of carriers.

It must be remembered that the grant of power contained in Paragraph 3 of Section 15 to establish through routes and joint rates whenever such action is deemed by the Commission to be necessary or desirable in the public interest, is not to be restricted or cut down through exceptions, except by plain and unambiguous terms. Certainly the change from the use of the term "any company" as it appeared in the Act to Regulate Commerce, as amended June 18, 1910, to "any carrier by railroad" as it appears in the present Act, as amended March 1, 1920, by the Transportation Act, was for a different purpose from that mentioned by the majority of the Court in its opinion (R., 125), where the majority said—

> "The retention of 'company' was not desirable because it would exclude individuals and would include carriers by water, pipe line, wire or wireless, which was not intended."

The Court evidently overlooked the language "*the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith,*" when it undertook to demonstrate that the change from the word "company" was to exclude carriers by water, pipe line, wire or wireless. Obviously, the section as it appeared in 1910, by its context, excluded pipe lines and wire companies, and also boat lines. If it be said that the paragraph as it appeared in the Act of 1910 might have been construed as limiting the power of the Commission with respect to through water-and-rail routes, and as forbidding the Commission to compel a rail line to unite in a through water-and-rail route at the sacrifice of

its long haul, the exception placed in the amended Act of 1920 amply provided for this contingency by expressly stating that the limitation should not apply where one of the carriers in the joint route was a water line. Therefore, none of the reasons suggested by the majority opinion for the change will bear scrutiny, unless it be that the word "company" did not include persons, a contingency, under present transportation conditions in this country, so remote as not to merit serious consideration by the Court to account for the change made in Paragraph 4. It is far more consonant with reasonable construction to consider that the change was advisedly made, the substituted term "carrier by railroad" aptly employed to confine the limitation to owners and operators of railroads and to exclude any contention, such as was advanced in the original *Express cases*, that express companies were within the protection thereof.

Especially is the change significant in view of what occurred in the original *Express cases*, decided in 1912, and in the light of the Commission's findings in those cases as to what was fundamentally necessary to make its national system of uniform express rates and direct through routes therein promulgated applicable by unifying the lines of the different express companies, without regard to selfish interests or the preservation of long hauls, and by treating them as a unit. The *Express cases* were decided subsequent to the Act of 1910, and the question with respect to alleged rights of express companies to maintain or protect their long hauls had arisen and been considered in those cases. The system of rates prescribed therein was made effective in February, 1914, and since the system of rates

prescribed for all express companies, whereunder they were treated as a unit, could not be operated without requiring the carriers to jointly establish and publish through rates between all points reached by the lines of the various companies, regardless of the length of their respective hauls, there was every reason why Congress, in amending Paragraph 4 of Section 15, should take pains to adapt the language to the Commission's plan and system of rates for express companies. In other words, the inclusion of express companies within the protection of the limitation would have destroyed the system of uniform through rates and direct joint routes found to be necessary and required by the decision in the *Express cases.* It would have prevented the Commission from treating all express companies as a unit forming one national express system for the purpose of establishing through routes and joint rates under the block and zone plan.

It has been pointed out that in its reports in the original *Express cases,* as well as in its reports and findings in this case, the Commission found that it was in the public interest for the express business to receive treatment similar to the mail service, and that it was more properly comparable with, and analogous to, the mail and parcel-post services than the freight service conducted by carriers by railroad. In the *Express cases,* as in its decision in this case, the Commission pointed out that the national system of rates and uniform through routes contemplated that all express companies should be dealt with as a unit forming one national express system. It had likewise said in its report of July 14, 1915, 35 I. C. C., 3, that:

> "In our original reports in this case, 24 I. C. C., 380, and 28 I. C. C., 131, which followed a very exhaustive investigation, we prescribed a uniform schedule of rates, classification, rules, and regulations, effective February 1, 1914, for all of the principal express companies doing business on the railroads of the United States. While in some instances the rates prescribed were increases over the old rates, our order, as a whole, effected very substantial reductions in rates."

And, at page 4 of the same report, it was said:

> "As a result of the efforts of petitioners and of state commissions to make the system uniform, aided in some instances by modifications of our order, the rates, rules, and regulations prescribed by us have been adopted for intrastate express business in 40 states, and more than 90 per cent of the express business of the country is now being handled thereunder."

Again, in *Proposed Increase in Express Rates,* 50 I. C. C., 385, it is said that under the system of rates inaugurated in February, 1914, express carriers were treated and dealt with substantially as a unit, and at page 391 of that report, it was stated:

> "It is unnecessary, however, to particularly consider the revenues or rates of each individual carrier. In the former proceedings, 24 I. C. C., 380, 28 I. C. C., 131 and 35 I. C. C., 3, these express companies were treated substantially as a unit."

The case last cited was decided June 18, 1918.

Certainly it is far more reasonable to assume that in 1920 in amending Paragraph 4 of Section 15, Con-

gress had in mind, or was cognizant of, the findings of the Commission in the *Express cases,* the distinction which the Commission had made between the express service on the one hand, and the handling of freight by railroads on the other, the exigencies of the two different classes of service, and the paramount necessity in the express service for a flexible system of uniform through routes and joint through rates, and, therefore, in amending Paragraph 4, took care to change the language so as to employ the specific term "carrier by railroad" and thereby remove any possible doubt or uncertainty with respect to the application of said restriction. The Commission, in promulgating and prescribing the system of express rates, was performing for Congress legislative functions, and it may be assumed that Congress had in mind what had been done in the respect mentioned, and it is fairly deducible that the purpose of Congress in changing the word "company" to "carrier by railroad" in Paragraph 4 intended to remove any possible doubt as to the application of said limitation and to place, beyond judicial criticism, the construction which had been placed upon Paragraph 4 of Section 15 by the Commission in the discharge of its functions.

If it be said that when the Transportation Act became a law there was only one express company in operation, it may well be answered that Congress had in mind the situation which arose in May, 1921, when the Southeastern began operations as a competitor of the American, since in the Transportation Act it stipulated that the American could only continue as a consolidation provided it made application to the Commission within 30 days after the passage of the Act so to continue, and

that pending the decision of such application, it should not stand dissolved (Section 5, Paragraph 7).

The majority opinion proceeds on the assumption that if it be possible to reconcile the terms "carrier by railroad," "its railroad," or "railroad operated in conjunction and under a common management or control therewith" with a construction which would bring express companies within the protection of the limitation and thereby cut down the power of the Commission, it must be done; although we are told that in other sections where the general context plainly refers to railroads, the descriptive term "carrier by railroad" should not be so expanded by construction. What legal principle compels the strained construction to bring express companies within the protection of Paragraph 4 of Section 15, or upon what theory that section should be interpreted to destroy and tear down what the Commission has built up, is not apparent. Certainly the cardinal rule of construction is that a general grant of power cannot be cut down by a proviso or by exception, save to the extent plainly required by the terms employed in such exception or proviso. Well recognized judicial principles require that the Courts shall curtail the grant of legislative power as little as possible, and only where the legislative context plainly and definitely so requires this to be done. Where there is doubt, the provisions granting power will be left intact and unimpaired, and this is especially true in this case where, if the construction placed upon Paragraph 4 of Section 15 by the majority of the Special Court prevails, important regulatory work of the Interstate Commerce Commission will be destroyed and the public

will be deprived of facilities which the Commission has found as a fact are necessary and desirable in the public interest.

The majority of the Court must have been impressed with the principles of construction above stated, as to which authority has heretofore been cited. They, however, were laboring under what they considered an impelling reason, but which we regard as a mistaken reason. They say (R., 126):

> "The case, indeed, is not one of ordinary construction in which the reasonable intent of Congress is to be gathered from the context, *but is rather one of executing a positive legislative mandate defining terms.*" (Italics ours.)

They must have overlooked the concession made in other portions of the opinion, where they recognize that the contexts of certain sections compel the construction that the term "carrier by railroad" refers only to railroad companies owning and operating railroads, and in connection with which the *"legislative mandate defining terms"* apparently disappears. If the "positive legislative mandate defining terms" is so compelling and all-prevailing, how can any different meaning be imparted to the term "carrier by railroad" when employed in any portion of the Interstate Commerce Act, and why does not the reasoning of the majority require that the term "carrier by railroad" shall include express companies and sleeping car companies wherever and whenever used in the Act? If the term were inflexibly so interpreted and applied wherever found in the Act, in the vast majority of cases the administration of the law would be totally

different from the administration heretofore applied by the Commission and in many instances would result in absurdities.

Aside from what the majority opinion refers to as a "discussion of words," it states that (R., 126):

> "We are confirmed in this interpretation by considering the possible reasons which may have moved this enactment."

Then, at page 127, there are set forth four reasons which, the opinion states, "occur to us as perhaps moving thereto."

The first is stated to be:

> "The natural justice in permitting one who initiates a thing to carry it forward and reap its benefits as far as possible."

There is nothing in Paragraph 4 of Section 15, even if it be applied to express companies, which seeks to protect solely the long haul of the originating carrier; the language "originating railroad" is not used in Paragraph 4 of Section 15. Even if that limitation had any application to this situation, or could be appealed to by an express company, the American certainly would not be permitted to claim its protection and use it only as a shield to preserve its alleged long hauls, without regard to the fact that in so doing it would short-haul the Southeastern in every such instance; and not only that, but would allow the Southeastern its absolute minimum haul on traffic from exclusive offices of the American to exclusive offices of the Southeastern. On this point the Commission said, in its original report in this case, 78 I. C. C., at page 133:

> "Traffic transported over joint routes from American eastern points to exclusive Southeastern points in North Carolina and South Carolina is transferred to the Southeastern at Raleigh and Charlotte, N. C., and Spartanburg, S. C. If this traffic were transferred at Washington, it would move over the Southeastern's direct route. The American claims that it is unreasonable in view of its present service to compel it to abandon any traffic to, or to share traffic with, the Southeastern. *On the same theory, the Southeastern might decline to join in through routes to or from its exclusive points unless it were given the long haul.*" (Italics ours.)

Bearing in mind that, from the exclusive offices of one company to the exclusive offices of the other, it is necessary in all cases to use the joint service, can it be said, under any circumstances, that in all instances the long hauls of the American Company will be protected, and the Southeastern shall be compelled to accept its minimum hauls on all traffic from the East destined to its exclusive offices?

It is respectfully submitted that, if equitable principles are to control, the more equitable disposition of the matter is that outlined and required by the Commission's original and supplemental reports, wherein the Commission found and required (78 I. C. C., at page 143):

> "that joint through routes shall be established, in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Company and the other via the transfer point selected by the American

> Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings."

Under that plan, formulated by the Commission as the proper solution of the problem, both companies have equal opportunity, and where the traffic is unrouted the originating carrier handles it via its long-haul route and transfers it at its long-haul junction. It is only where the shipper, who, after all, "initiates the traffic," directs the routing that the originating carrier may be short-hauled, and in such instances the law contemplates, and the Commission states in its report, that such carrier will be compensated in the matter of divisions.

The Commission, in the original *Express cases,* disposed of any contention that the initial carrier by express was entitled to its long haul by saying that its selfish interests, and any equities which otherwise would attach, must give way to the public necessity and convenience, and that compensation could and would be made through the adjustment of divisions (28 I. C. C., at page 411).

The second reason suggested in the majority opinion is that the Carmack amendment to the Hepburn Act of 1906 had imposed on the initial carrier the responsibility for the whole carriage, and that, therefore, the initial carrier should be permitted to transport the shipment as far as possible. This reason overlooks the provision in the Carmack amendment now appearing as Section 20 of the Interstate Commerce Act, expressly providing for recovery over by

the initial carrier for any liability entailed upon it through the default of a connection. As stated by Circuit Judge Bryan in his dissenting opinion, (R., 131):

> "The liability of the initial carrier, whether railroad company or express company, for loss or damage to shipments, described in section 20 (11) is appealed to as a reason for including express companies along with railroad companies in section 15 (4), so as to enable such express companies to protect themselves, so far as possible, against liability due to the default of connecting carriers. It is not to be assumed that the Commission would establish through routes and compel the initial carrier to deliver either freight or express to a connecting carrier which was unable to make good any loss caused by it."

The third reason urged, namely—

> "The uncertainty, delay and risk of loss and damage incident to unnecessary transfers would apply equally to freight and express."

This reason, whether applied to freight or express, could only have force where the originating line reached with its own service the ultimate destination of the shipment. Otherwise it would be necessary to transfer the shipment en route and to employ the services of two or more lines. Therefore, a shipment from an exclusive office of one company to an exclusive office of the other would have to be transferred at some point en route to reach destination and the joint route would require only one transfer, whether that be at the originating carrier's long-haul junction or at a short-haul junction. If the reason suggested

were controlling, it would prevent the establishment of any joint route, whether by freight or express, where the originating line was in a position to handle the shipment from point of origin to destination, and, carried to its logical conclusion, would prevent the use of any joint route from a common point to an exclusive office of either company.

The fourth reason advanced for identical treatment of express companies and railroads will not stand investigation. If, in framing Paragraph 4 of Section 15, Congress had in mind the investment of the carrier on which it must make a return and gave consideration to the permanent character of the railroad investment and the fixed physical location of roadbed, track and right of way, with the corresponding fixed and permanent charter obligations and public duties assumed by railroad companies, there would have been every reason for distinguishing such investment from the transitory nature and flexible changeability of routes operated by express companies under short term contracts, in many cases terminable at the will of the parties or on short notice. Under such contracts the railroad furnishes the cars, motive power and transportation service, the express company furnishing merely its messenger service on the train, and employing its vehicles and motor equipment for the express terminal pick-up and delivery service. The investment of the express company is confined principally to personal property, such as motor trucks, hand trucks, wagons, etc., which can be used for pick up and delivery or transfer service at any point of origin or destination and transferred from one terminal to another as necessity may require. There is no pos-

sible similarity between the property investment of an express company in this movable personal property and the property investment of a railroad which consists largely of fixed roadbed, right of way, yards, stations, grounds and buildings, fixed wayside signals, interlocking plants, and terminals, all operated under its fixed and permanent charter obligations.

If it be said, as appellee, Seaboard Air Line Railway Company, attempts to assert through its intervention in this case, that the express company must be broken up into the separate constituent railroads and considered merely as the agent of the separate railroads, then the express company, when so considered, cannot have or acquire any greater or larger rights than could be separately claimed by the individual, separately owned, operated and managed railroads. When the separate railroads are brought forward and declared to be the real parties at interest, it is perfectly obvious that artificial express routes extending over two or more separate railroads cannot be created so as to secure to such express routes greater protection than the separate railroads could claim under Paragraph 4 of Section 15.

It will later be pointed out, in discussing the intervention of the appellee, Seaboard Air Line Railway Company, that should the problem be looked at from the standpoint of the separate railroads and the express company be treated merely as the agent thereof, then the long haul to be protected is *not* the combined hauls of all the railroads over which the express company may have contracts, but the separate hauls of the individual railroads, which separate units cannot so

combine or unite their service as to discriminate against other railroads and violate Section 3 of the Act.

For example, the Pennsylvania Railroad would not be permitted under Section 3 to establish through routes and joint rates applicable via Washington with the Seaboard Air Line for points south of Washington and deny similar arrangements to other connections at Washington, such as the Atlantic Coast Line or Southern Railway Company.

It may be noted here that under the Commission's order establishing *additional* through routes and joint rates, applicable via Washington and the Southeastern Express Company, the through routes and joint rates already in existence over the Pennsylvania to Washington and thence R. F. & P. to Richmond and thence Seaboard Air Line south are not discontinued or in any way interfered with; but the order requires just what the law would require of these railroads if each were doing its own express business. This is perfectly apparent because under the specific terms of Paragraph 4, relied upon by the American Company, that paragraph cannot be appealed to where Section 3 is involved, and Paragraph 3 of Section 3 expressly forbids discrimination between connecting lines and requires equal treatment in the matter of interchange of traffic. Furthermore, save for the pooling of traffic and revenues provided for under the uniform contract between the American Company and its rail lines, the Baltimore & Ohio Railroad Company would be as directly competitive with the Pennsylvania Railroad between the East and Washington in express transportation as it is in the freight and passenger service.

If the Baltimore & Ohio operated its own express service and the Pennsylvania operated its express service, those roads would naturally form through routes and joint rates with the Southern carriers, interchanging traffic with them at Washington in the express service just as is done in the freight and passenger service.

This brings us to the question whether the American Railway Express Company, which derived its so-called long hauls for which it claims protection under Paragraph 4 of Section 15, through the pooling of traffic and revenues, forbidden by Section 5 except such pooling arrangement be approved and continued with the permission of the Commission, can invoke in this litigation the protection of Paragraph 4, Section 15, even should an express company be held to be within the terms of said limitation.

Point 2.

Appellee, the American Company, Is Equitably Estopped From Questioning the Power of the Commission to Make the Order Attacked Upon the Ground on Which the Interlocutory Injunction Was Granted.

The claim of appellee, the American Company, for its alleged long hauls and its attack upon the order upon the ground that such order contravenes Paragraph 4, Section 15, utterly ignores the circumstances and conditions under which it secures its so-called long hauls through exclusive routes over separate lines of competing railroads under its uniform contract and the pooling arrangement embodied therein.

The American Company began this litigation by filing a bill of complaint, seeking to annul, have set aside and enjoined the order of the Commission. It has entered a court of equity and like all suitors therein must stand the tests which are applied to those seeking equitable relief. It must come into court with "clean hands," and when it attacks an order of the Interstate Commerce Commission, it becomes a matter of material inquiry and investigation as to whether it is in position to make such attack; and, when it challenges the power of the Commission in regulating it through an order and sets up a claim to a particular right, it becomes pertinent to inquire how and under what circumstances such alleged right was acquired, and is sought to be exercised. When it claims the protection of one provision of the law, its attitude towards other provisions of the law, equally solemn and binding, becomes a matter of inquiry here, since it cannot claim the protection of Paragraph 4, Section 15, if the recognition of such claim would create violations of other positive provisions of the Interstate Commerce Act.

What, therefore, is the status of the American Company and how has it acquired its so-called long hauls for the protection of which it invokes Paragraph 4 of Section 15?

As appears from the report of the Commission in this case (R. 19), the American Company grew out of the consolidation of the several express companies which were in operation prior to the war period and this consolidation, which was a war measure and was brought about by a contract between the several ex-

press companies and the Director General, took place in June, 1918, and continued until the termination of federal control. Thereafter it was permitted to continue by Paragraph 7 of Section 5 of the Interstate Commerce Act, which became effective March 1st, 1920, which paragraph reads as follows:

> "The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory Act; and pending the decision of the Commission such consolidation shall not be dissolved."

Application was made by the American for authority to continue the consolidation and the Commission did approve the continuation thereof (*In Re Consolidation of Express Companies,* 59 I. C. C., 459, decided December 7, 1920).

Thereupon, it became necessary, under the provisions of Paragraph 1, Section 5, of the Interstate Commerce Act, to submit to the Commission for approval Article V of the proposed uniform contract between the American and the roads over which it would operate, since said Article V provided for the pooling of traffic and a division of earnings between different and competing railroads which was prohibited by Section 5 of the Act unless and until sanctioned by the Commission after investigation.

The submission of this contract and the petition for its approval resulted in the proceeding before the Commission entitled *Ex Parte* 76, *Express Contract,* 1920, 59 I. C. C., 518. The petitioners in that proceeding were the American Company and the railroads over which it operated, the latter acting through an association known as the "Association of Railway Executives." The petitioners therein sought the approval of the then-proposed contract between the American Company and the common carriers by railroad parties to such contract. The Commission held that Article V of the uniform contract *did* constitute a pooling arrangement within the meaning of Section 5, Paragraph 1, of the Interstate Commerce Act.

In the situation then presented, where there was only one express company, namely, the American Company, operating over a large percentage of the rail mileage of the United States, approval was given to Article V of the uniform contract providing for the pooling of traffic and the division of earnings otherwise than according to individual performance, it being found under the combination of circumstances then existing, when there was only one express company in operation, that such pooling arrangement would not unduly restrain competition.

It is to be noted, however, that the Commission, in approving Article V of the contract, and after reciting the conditions which existed in the express service prior to the consolidation of the entire service into the American Railway Express Company, said, at page 522:

> "While, under the combination of circumstances recited, competition between the separate companies was reduced to a minimum, an element of potential competition of no slight importance was and must always be a factor in the plan under which the express business is conducted in this country."

When the Interstate Commerce Commission had before it the complaint of the Southeastern Express Company against the American Railway Express Company, the potential competition referred to had become actual competition in the South, and such actual competition required consideration at the hands of the Commission. Its approval of Article V of the uniform contract of the American could only consistently continue through action on the part of the Commission which would keep alive competition and not allow it to be unduly restrained.

As further illustrating the different conditions existing when the Commission gave its approval to said pooling arrangement under which the American Company operates and by which it combines the service of independent lines of railroad, many of them competitive, and the situation which thereafter arose on May 1st, 1921, when the Southeastern was organized and commenced operations, it is interesting to note that in its opinion, rendered December 7, 1920, 59 I. C. C., 518, approving the said pooling arrangement, it was pointed out that there was only one express company in operation, and at page 522 it was said:

> "While counsel for those lines (the rail lines) contends that there might be competition in point of service, it is not entirely clear that there could

> be competition of any character. The only rates and services here considered are those of one carrier, the express company; the statutory right of a shipper to designate the routing of his traffic and the correlative duty of a carrier to observe his instructions come into play only where 'two or more through routes and through rates shall have been established' and there is 'a connecting line' to which the initial carrier can make delivery pursuant to the instructions."

Thereafter, when the Southeastern was organized, the competition which had formerly been merely potential and could not be actual when one express company monopolized the express transportation business, upon becoming actual, would have been restrained and stifled had the American Company been permitted to continue its tariff restrictions and thereby permanently close routes which it had theretofore used preferentially when it had the choice of all routes, and which, by its tariff restrictions, it sought to close, merely because the Southeastern formed a link in such routes. The approval of Article V of the contract and the pooling arrangement therein contained, given by the Commission under Section 5 of the Act, is declared by Paragraph (3) of Section 5 to be subject to such modification from time to time as the Commission, for good cause shown, may deem necessary or appropriate. Therefore, the determination of the question whether the tentative approval given to this pooling arrangement and consolidation under the conditions existing in December, 1920, when there were no competing express companies in the field, should be continued, is a matter which rests within the discretion of the Commission, as its approval originally given is expressly declared to be subject to such modification or change

from time to time as the Commission may deem necessary or appropriate. Under these conditions, it is perhaps fortunate for the American Company that the Commission, through its findings and order in this case, has not allowed the situation created by the American Company about May 1st, 1921, to continue, and bring about the necessity for the Commission to withdraw its approval of the American's uniform contract so far as the same provides for the pooling of traffic and earnings otherwise than according to the individual performance of the contracting railroads. Should appellee be allowed to cancel rates and close joint routes permanently, it would be no longer in the power of the Commission to approve this pooling arrangement or combination, inasmuch as the authority delegated by Congress to the Commission to permit such arrangements is upon the condition that the same *shall not unduly restrain competition.*

In other words, the Commission has found a way by which its approval of the contract can legally continue, provided the through routes and joint rates which it has required, in the order already entered, or which it may hereafter require, be kept open and made available to the public.

Under the pooling arrangement contained in the contract between the American Company and its rail lines, and the plan and method therein provided, whereby the traffic and earnings are pooled and are apportioned otherwise than according to individual performance and without separate solicitation in the interests of competing lines, there is no longer any element of competition for the traffic between the rail

lines over which the American Company operates. By virtue of this pooling arrangement and its uniform contract, the American Company forms such routes and combinations of rail lines over which it operates as it may find expedient, without regard to the fact that if the express traffic over such railroads were handled by other express companies, such other companies would be competitive and would naturally unite in competitive routes, just as competing railroads and their connections form through routes in order to handle competitive traffic.

For instance, take the express route of the American from New York to Atlanta. Such route is constituted by combining the services of the Pennsylvania, the Richmond, Fredericksburg & Potomac Railroad and the Seaboard Air Line Railway to form what the American calls its exclusive route giving it the entire haul between New York and Atlanta. The Baltimore & Ohio Railroad also operates between New York, other eastern points and Washington. The Baltimore & Ohio is competitive with the Pennsylvania in the handling of passengers and freight between eastern points and Washington, just as the Southern Railway is competitive with the Richmond, Fredericksburg & Potomac and the Seaboard Air Line in handling passengers and freight between Washington and the South. If there were one express company operating over the Pennsylvania, as well as over the R. F. & P. and the Seaboard Air Line, and another competing express company operating over the Baltimore & Ohio, naturally the latter company would form southern connections with such railroad or express company as did not have through routes and arrangements with the

express company operating over the Pennsylvania. Likewise, if there were no pooling of freight or earnings in the express business, and it was to the interest of the Pennsylvania and the Baltimore & Ohio to solicit independently express traffic, as they do freight and and passengers, then there would be active competition between the Pennsylvania and the Baltimore & Ohio for express moving not only between eastern cities and Washington but between eastern cities and points in southern territory via Washington. However, by reason of the fact that the American Company operates its express service over all the railroads except the Southern Railway System lines, and by reason of the further fact that, under its uniform contract, traffic and earnings are pooled, the American Company is thereby enabled to nullify or prevent the competition existing between the Pennsylvania and the Baltimore & Ohio in the matter of handling of freight and passenger traffic from coming into play or having any effect whatever in the handling of express traffic.

When it seeks to deny to the public the use of the service of the Southeastern, operating over the rails of the Southern Railway Company, the American goes *even further* in its efforts to monopolize the express business and to stifle competition by eliminating, through its tariff restrictions, the routes over the Southern Railway Company from the express situation, so far as participation in the handling of traffic to and from the East is concerned, although the Southern Railway is a most potent factor in such competition growing out of the handling of competitive freight and passenger traffic between the East and the South.

The crux of the matter is the method in which the American Company seeks to use the powers acquired under this pooling of traffic, division of earnings and the amalgamation of the service of rail lines under its uniform contract. That power might be used lawfully by recognizing and giving full play to competition through the establishment of through routes and joint rates, allowing the shipper to select and designate, under equal rates and uniform through routes, the handling of the traffic and the service which he prefers. The Commission, by its order in this case, has provided for such competitive handling between the defined eastern territory and the offices of the Southeastern on the main line of the Southern Railway between Washington and Birmingham. Under such conditions, it is remarkable, to say the least, that the American should have the temerity to assail the order upon the ground "that the Commission has no power or authority to make or manufacture competition between carriers."

As set forth in its answer the Southeastern avers that it is not only within the power of the Commission to prevent obstruction of reasonable competition which actually or potentially exists between the carriers, but that it is its duty to exercise the powers conferred upon it by Congress to stimulate reasonable and healthy competition, and it is to the public interest that it should do so, and further that this duty here arises, not only under general and well recognized principles and governmental policies, but such obligation also arises from the existing status of the American and by virtue of the provisions of the uniform contract which it has with various rail-

roads over whose lines it operates, which contract embodies the pooling arrangement, and which arrangement in turn can only be permitted to continue provided it is so used and employed as not to stifle or restrain competition.

It will not suffice for complainant to answer that since express rates are generally the same via all routes under the block plan of stating rates, therefore competition would not be in the public interest. In the first place, if the restrictions placed by the American against the application of the rates were permitted to remain in effect, they would limit the rates to its own routes and close all competing routes. Secondly, even where the rates are the same there are other important benefits accruing to the public from competitive service.

This question was considered and commented upon by this Court in passing upon the validity of the merger or consolidation of the Union Pacific and Southern Pacific in the case of *United States* v. *Union Pacific R. R. Co.*, 226 U. S., 61. In delivering the opinion of the Court in that case, Mr. Justice Day said, at page 87:

> "To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.
>
> "Competition between two such systems consists not only in making rates, which so far as the shipper was concerned, the proof shows, were by agreement, fixed at the same figure, whichever

route was used and then apportioned among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment."

The Commission, in its original report in this case, 78 I. C. C. 126, expressed substantially the same views with respect to the benefits from competition accruing to the public in the express service as those stated by this Court in the case just quoted with respect to freight and passenger transportation, when the Commission said, at page 139:

"The testimony shows that the express service at common points has improved since the formation of the Southeastern. This improvement is probably due to competition. There is no competition as to rates because all rates are the same under the block system. * * * In considering competition, time is not the only important element. Competition tends to make each company improve its general treatment of the public, its practices, rules, and regulations in regard to its methods of doing business. Taking all of these things into consideration and the funda-

> mental principles laid down in our two decisions in the *Express case*, we find as a fact that it is in the interest of the public to order established reasonable direct joint express routes."

Under the pooling arrangement contained in the contract between the American and its contract rail lines and the plan and method therein provided, whereby the division and routing of traffic over the railroads is left entirely with the American Company, there is no longer any element of competition for the traffic among the railroads in connection with which the American operates, and that company is thus left free so to combine the service of the rail lines, route and handle traffic, and apportion it among the rail lines over which it operates as will best suit its own interests and purposes.

The American, in interchanging traffic with the Southeastern, as pointed out in the Commission's report, carries the traffic usually to the junction point nearest destination and transfers it to the Southeastern generally at remote interior points, which points of interchange give the Southeastern its minimum hauls. This results in closing the competitive routes and service of the Southeastern over the Southern Railway System lines from Washington and other border transfer points when the traffic is destined to exclusive Southeastern offices located on the lines of the Southern Railway, while the use of competitive routes is absolutely denied in connection with the handling of traffic between common points or between common points and exclusive offices of the American. That company insists that it should be permitted to continue this fixed policy and plan of routing the traffic, and claims that it cannot be com-

pelled to participate in joint routes or through rates which will short-haul it and require it to transfer traffic from the East destined to the South to the Southeastern at Washington under shipper's routing instructions; notwithstanding the fact that it only secures its so-called single-line hauls, or long hauls to interior junction points, under the pooling arrangement embodied in its contracts, which, under the provisions of Section 5, Paragraphs 1, 2, and 3, can only be continued and operated with the sanction of the Commission, and which can be sanctioned by the Commission only when, after investigation, the Commission is of the opinion that the division of traffic or earnings—

> "Will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition."

Under these express conditions, and only when it is found that the proposed arrangement *will not unduly restrain competition,* is the sanction of the Commission authorized, and even in that case it is further provided that—

> "The Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

It is then provided in Paragraph 3 of Section 5 that—

"The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under Paragraph (1) or (2), as it may deem necessary or appropriate."

(A) Certain Conclusions Reached and Findings Made by the Commission in Its Reports Accompanying and Made a Part of Its Order.

It may not be inappropriate at this point to refer to certain of the conclusions and findings made by the Commission in its original and supplemental reports accompanying and made a part of its order attacked and enjoined in this case. It should be kept in mind that the order enjoined requires:

First, that routes between eastern territory and points reached by the main line of the Southern Railway from Washington through Atlanta to Birmingham be kept open and available under shipper's routing in connection with the lines of the Southeastern Express Company with transfer to the latter at Washington, which routes were not only open, but were used preferentially in reaching and serving this territory prior to May 1, 1921, when appellee, the American Company, had the choice of all routes.

Second, transfer between appellee, the American Company, and the Southeastern at the border transfer point of Washington, and that the tariffs shall provide for the right of a shipper to designate in writing the routing of shipments.

The order, as already explained, does not require that the preferred routes of the American Company, whether single-line or joint, be closed or discontinued.

Those routes, preferentially used by the American on traffic from its exclusive offices to the exclusive offices of the Southeastern, embrace the maximum haul which the American can secure, and, as stated, allow the Southeastern its minimum haul. The only effect of the order is to establish additional routes in connection with the Southeastern through the border transfer point of Washington, which additional routes the Commission finds from the evidence before it are necessary and desirable in the public interest.

It should be kept in mind that the territory on the main line of the Southern Railway between Washington through Atlanta to Birmingham is the Southeastern territory to and from which the through routes are ordered. It is necessary that the service of the Southeastern be employed in handling traffic between its exclusive offices and exclusive offices of the American Company north of Washington, whether the transfer be made to the Southeastern at Washington or at some point further south. The situation, which the order attacked sought to remedy, was the closing of the Southeastern's routes over the lines of the Southern Railway Company to and from the Washington gateway; the denial of the use of the frequent passenger train service operated over Southern Railway's main line between Washington through Atlanta to Birmingham, which routes were and are the established mail and passenger routes between the East and the territory served by Southern Railway; and the forcing of all express traffic for points located on the Southern Railway over routes and through interior transfer points which would not be used in either the mail or the passenger service.

As stated, the order did not close the American's routes, but did provide the *additional* routes in connection with transfer to the Southeastern at Washington, thereby making available to the public the frequent passenger train service operated over the main line of the Southern Railway within the defined territory.

The Commission found, as stated, at page 139 of the original report (78 I. C. C., 126):

> "The testimony shows that the express service at common points has improved since the formation of the Southeastern. This improvement is probably due to competition. * * * Taking all of these things into consideration, and the fundamental principles laid down in our two decision in the *Express case,* we find as a fact that it is in the interest of the public to order established reasonably direct joint express routes."

The findings in the original *Express cases* as to the public necessity and convenience to be met and responded to by the uniform system of through rates and the universal through routes therein prescribed are as clear and explicit as can be. Those findings are expressly referred to in the reports in this case and were made a part of the Commission's findings herein, as shown not only by the copious extracts from the decisions in the original *Express cases,* but by the explicit declaration that the Commission took into consideration, in formulating its action in this case, the fundamental principles "laid down in our two decisions in the *Express Cases.*"

And it again declares in this case that it was its purpose there, "to treat all express companies as a unit

forming one national express system, to have express move over direct routes, and to make the same rate applicable thereto regardless of the route over which it moved." It likewise reiterated that "it was in the public interest for the express business to receive treatment similar to the mail service," and that in the *Express Cases* it had required the express companies to establish the most direct routes regardless of their long hauls (78 I. C. C., 126, at pp. 137, 139).

In the first report in this case (78 I. C. C. 126), after having considered and analyzed the evidence, pointed out briefly the underlying purposes and objects sought to be accomplished in the *Express Cases* through the uniform system of through rates and direct routes therein required, and after having reviewed the respective contentions of the American and of the Southeastern, the Commission made the following definite findings and conclusions, 78 I. C. C., p. 143:

(a) That it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Company and points on the lines of the Southeastern;

(b) That the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel;

(c) That joint through routes shall be established in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern and the other via the transfer point selected by the American;

(d) That the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings;

(e) That the American should cancel its restrictive schedules, and that both companies should recognize as "established routes" the reasonable direct routes which they shall establish in accordance with this finding;

(f) That each express company, when traffic received by it is unrouted, should have the right to use the reasonable route which will give it the longest haul, but if the express is routed via established routes, the routing instructions should be obeyed.

The American Company having failed to comply with the requirements contained, and the principles announced, in this report, the Commission thereupon made its supplemental report, 81 I. C. C., 247, wherein the specific through routes and joint rates between the defined territory in the East and points on the lines of the Southeastern, from Washington through Atlanta to Birmingham, were prescribed and ordered.

The Commission said, at page 250:

> "It was our expectation that the principles laid down by us in our report would be complied with without the necessity of entering an order. It is now apparent that an order is necessary."

The Commission then made the further finding and requirement, which has already been quoted, but is repeated for convenient reference, as follows:

> "We shall at this time by order prescribe certain through routes and joint rates with respect to which the record warrants the finding that they are reasonable and will require their establishment, reserving for further consideration either upon the present record or upon further hearing the establishment of additional routes."

The routes required were then specifically outlined and the order entered likewise sets them forth with certainty.

The findings of the Commission have thus been reviewed at some length to show that as a result of its investigation in this case, and upon a record amply supported by evidence, the Commission has found, in almost the identical language employed in Paragraph 1 of Section 5, that the additional routes ordered are "in the interest of better service to the public," and that unless said additional routes are provided and kept open and available to the public under the joint rates so prescribed, "competition will be unduly restrained" and the competitive service over the Southeastern's routes practically eliminated, thereby perpetuating the monopoly of express transportation in the American Company and preventing the movement of express over the most natural and logical routes, those used by pasengers as well as by the government as routes for the handling of mail and parcel post.

By paragraph (1) of Section 5 a positive duty was laid upon the Commission to see to it that the combination of rail lines and pooling of traffic and revenues which had been permitted should not be used or employed except "in the interest of better service to the

public" and should not be permitted to "unduly restrain competition."

Having found that the American was so using its combination of the service of rail lines as not only to restrain, but to destroy, competition and that the public interest and convenience imperatively required that additional routes be established and maintained under its uniform system of express rates, the Commission made, after the most careful and painstaking investigation, the order attacked. With these findings of the Commission before the Court showing beyond dispute that the successful claim by the American to the benefits of the limitation contained in paragraph 4 of Section 15 of the Act, would not promote the public interest but, on the contrary, would result in the undue restraint of competition, and indeed in the elimination thereof, that Company is not in equity and good conscience in position to claim the protection of the limitation in question, even if it were otherwise applicable and could be availed of by an express company.

This thought was forcibly expressed by His Honor, Judge Bryan in his dissenting opinion, wherein he said (R., p. 132):

> "Furthermore, I think it is clear from the act that express companies do not stand on the same footing as railroad companies * * * The contract between the American Express Company and the railroad companies over whose lines it operates provides for a pooling of freights and a division of earnings which is made unlawful except by permission of the Interstate Commerce Commission, acting in the public interest, Section 5 (1); and can exist only under such rules and regulations and upon such terms and conditions

> as the Commission finds to be just and reasonable. Section 5 (2). Such contract is also subject to any supplemental orders the Commission may deem necessary or appropriate. Section 5 (3). And the act specifically requires that within 30 days from its approval the plaintiff herein make application to the Commission for the consolidation which it now enjoys. Section 5 (7). It therefore seems to me that, in establishing through routes for express companies and in dealing generally with them, the Interstate Commerce Commission, has practically unlimited power, including that to require routings by shippers to be complied with; provided always its acts are just and reasonable, and not arbitrary."

It is then pointed out in the dissenting opinion that if the American is permitted to use its pooling arrangement and contracts to combine competing lines of railway, and after having done so, is permitted to claim the protection of Paragraph 4, Section 15, the result will be to place it in the power of that company to monopolize the express business of practically the entire country. This is clearly stated in the dissenting opinion, at page 132, as follows:

> "If express companies are included within the terms 'carriers by railroad' in section 15 (4) and therefore have a right to the long haul over the railroads with which they have contracts, then the American Railway Express Company, having such contracts with all railroad companies except the Southern, has it within its power to prevent competition by other express companies, and thus, to a considerable and dangerous extent at least, to monopolize the express business of the entire country. The whole history of the Interstate Commerce Act, and of the many amendments to it, repels the idea that such a result was ever intended by the Congress."

Before leaving this subject, attention is again called to the well-recognized principle, abundantly established by the decisions of the Commission, that even carriers by railroad may not claim the protection of the limitation provided in Paragraph 4, Section 15, if by so doing they would perpetuate or create a situation which would be in contravention of other positive provisions of the Act, and that consideration must be given, not alone to Paragraph 4 of Section 15, but to the other provisions of the Act and the duties and responsibilities therein imposed upon carriers within its terms. The decisions so holding will be referred to in discussing the next point, but since the claim on the part of the American Company to the protection of the limitation embodied in Paragraph 4 of Section 15 is being set up as the foundation for the contention that the Commission exceeded its statutory power, it is entirely pertinent to inquire as to which is more important, even if the limitation could be availed of by an express company, viz., that the American Company, upon the one hand, should be prevented from monopolizing express transportation and unduly restraining competition therein against the public interest and convenience, thus bringing about a situation condemned by Section 5; or whether, upon the other hand, the public convenience and necessity shall be disregarded, competition be unduly restrained, if not eliminated, in order that the American may be given the benefit of the limitation provided in Paragraph 4 of Section 15, as claimed by it. Ought not a litigant, even if technically entitled to the benefit of a limitation found in the law, to be estopped from claiming such benefit where its use thereof is improperly employed and results in the violation of other

sections of the same law, especially when such violations as here exist render its very continued existence illegal? It cannot be said that to permit the American to assert the right it claims, and thereby refuse to establish the additional routes ordered, will not create the very situation condemned by Paragraphs (1), (2) and (3) of Section 5, viz., the militation against the public interest and the undue restraint of competition, because the Commission has expressly found in this case that the public interest and necessity require the establishment of the additional routes and the relief afforded by its order, and that unless the order be obeyed, the public interest will suffer and competition will be restrained.

These findings are unchallenged and furnish ample warrant for the comments of Judge Bryan as to the situation which would be produced if the American Company, having contracts with all railway companies except the Southern and its affiliated lines, be thus permitted to unduly restrain competition, and thus, to a considerable and dangerous extent, monopolize the express business of the entire country.

Point 3.

Even if Paragraph 4, Section 15, Were Applicable to An Express Company, the Facts Found by the Commission Show That Section 3 Is Involved, and Its Findings Show Conclusively That the Order Made Is Necessary to Prevent Undue Discrimination Condemned by Section 3.

Paragraph 4, Section 15, protecting the long-haul of a carrier by railroad, is not applicable and cannot

be invoked where Section 3 is involved. This is obvious from the terms of Paragraph 4 itself and the reservation therein that the limitation shall not interfere with the provisions of Section 3, such limitation being expressly subordinated to the provisions of said Section 3.

The section last mentioned deals with and forbids any unjust discrimination or undue prejudice against either persons or localities or any particular description of traffic and likewise forbids discrimination against connecting carriers.

Paragraph 1 of Section 3 provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or *any particular description of traffic*, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or *any particular description of traffic*, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Italics ours.)

Paragraph 3 of Section 3 expressly forbids discrimination between connecting lines as follows:

> "All carriers, engaged in the transportation of passengers or property subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property

to and from their several lines and those connecting therewith, *and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.*" (Italics ours.)

Where the provisions of Section 3, forbidding discrimination, come into play ,or where a situation arises which would contravene or violate the provisions of Section 3, the restriction contained in paragraph 4 of Section 15 cannot be invoked because the limitation named in said paragraph is expressly subordinated to the provisions of Section 3 by the language appearing in parenthesis in said Paragraph 4 of Section 15, being in part as follows, "except as provided in Section 3."

Even prior to the amendment of February, 1920, when the restriction contained in Paragraph 4, Section 15, did not embody this specific exception and subordination of said restriction to the provisions of Section 3 of the Act, the Commission had repeatedly held that the limitation imposed could not be relied upon or appealed to by railroads to protect their long hauls, where to make literal application of said restriction and deny the through routes and joint rates sought would result in violations of Section 3 forbidding discrimination or in violations of other provisions of the Act. This had been expressly held not only as to persons and localities, but as to connecting railroads. Notwithstanding the restriction contained in said Paragraph 4 of Section 15, as it appeared in the Act of 1910, the Commission had exercised its power to establish through routes and joint rates where nec-

essary to remove undue discrimination or prevent undue prejudice either as against persons or localities, or with respect to connecting carriers.

The chaotic rate situation, which had resulted from the effort of the American Company to destroy so completely the system of rates established by the Commission as to prevent any competitive handling of traffic between common points and exclusive offices, or between common points, and to force the exclusive office traffic via its long haul junctions, has been outlined in the statement of the case.

It is necessary to understand the situation with which the Commission was confronted when it came to consider this case and to determine what action should be taken to remove the manifest discriminations and violations of the Act which were created by the restrictions upon the application of rates and the use of routes sought to be imposed by the American Company.

At page 139 of its original report in this case, the Commission said (78 I. C. C., 126, 139):

> "However, when the Southeastern was created the American ceased to use certain direct routes over which it had handled express and substituted therefor other routes. The fact that the discontinued routes were used by the American, when it had access to all routes over all carriers, indicates that they were reasonable routes in and of themselves, although they may not have been the only reasonable routes over which express could have been handled. Because the American has worked out other reasonable routes is not a sufficient reason for permitting reasonable routes, in

connection with the Southeastern, to be closed. The fundamental principles laid down in the *Express Cases* were prescribed at a time when there were 11 express companies. They should be followed now."

The foregoing contains the explicit finding that the American Company upon the advent of the Southeastern had closed direct routes which it had used preferentially when it had the choice of all routes, and that this action taken by the American was in contravention of the fundamental principles laid down in the original *Express Cases.*

It is desirable to see just what the rate situation was following the action of the American in restricting its tariffs in its effort to close routes over which the Southeastern would operate on and after May 1st, 1921, and to prevent the uniform application of the system of rates which had theretofore applied over all routes thereby giving the same rate between two points, no matter what route was used. To reach points local to the lines of the Southeastern, it was necessary to employ the Southeastern's service from some junction or interchange point. The American, therefore, left in effect joint rates between its exclusive offices and the exclusive offices of the Southeastern. These joint rates were not limited in the *published tariffs* to any particular route or via any designated transfer point, but were published in the tariffs without restriction. In its supplemental report (81 I. C. C., page 248) the Commission said, concerning the application of the joint rates between exclusive offices:

"From exclusive points on the line of one company to exclusive points on the line of the other

> company, there are no restrictions in the tariffs as now published, and the rates are the same regardless of the route over which the traffic moves.."

After having thus pointed out the *legal effect* of the *tariffs* on file, the Commission then said (81 I. C. C., 248):

> "But under the construction placed by the American upon the provisions of the tariffs with respect to the right of shipper to designate routing, it declines to observe such routing and transports the traffic over routes customarily used by it."

Under the tariffs as they existed, therefore, the joint rates were in effect between exclusive offices of the two companies. The joint rates were not restricted under the tariffs and legally applied in connection with the Southeastern via Washington. The American, however, declined to recognize shippers' routing, although, as the Commission points out, such refusal upon the part of the American was plainly in disregard and in violation of its tariff provisions (78 I. C. C. 141).

The Commission's order, attacked and enjoined, merely required that the joint rates, voluntarily established and already published in the tariffs between the exclusive offices of the two companies and applicable in connection with the Southeastern via Washington under the tariffs as published, should be continued in effect, and that the American should respect its published tariff provisions, and it was ordered to permit shippers to use the through rates and joint routes as published when they elected to do so by specifically

routing their traffic via the Southeastern at Washington. Manifestly, Paragraph 4, Section 15, was not involved, so far as the mandate of the order in this respect was concerned, because the American had already published the joint rates between its exclusive offices and the exclusive offices of the Southeastern under the concurrence of the Southeastern, and those rates as published were *not* limited in their application, but as the Commission expressly found, they applied as published in connection with the Southeastern via Washington, although the American, *in violation of its own tariff provisions*, was declining to permit the joint rates so published to be used in connection with the Southeastern via Washington, under shippers' routing instructions. Therefore, even if Paragraph 4, Section 15, had applied or could be invoked by an express company, the Commission's order is amply justified and its action was plainly required under its findings with respect to the rates as published between exclusive offices of one company and exclusive offices of the other.

It is no answer to this situation to contend as the American did before the Commission, that while the joint through rates were published between exclusive offices without restriction in the tariffs, the route in connection with the Southeastern via Washington was not "an established route," and that consequently, the American could prevent a shipper from using the joint rates and through routes in connection with the Southeastern via Washington under the situation existing at the time of the hearing. The Commission considered, in its original report, this very contention on the part of the American, and said (78 I. C. C. page 141):

> "As the American transfers some traffic to the Southeastern at Washington for transportation to certain southeastern points, *it cannot be heard to say that there are no established routes to such points in connection with the Southeastern at Washington.* It appears, therefore, that by providing in its classification for the right of the shipper to route over established routes and declining to observe such designation of routing over established routes, *it is acting in disregard of its tariff provisions.*" (Italics ours.)

Unquestionably, in any view of the case, the Commission had the power under the tariff situation existing and above pointed out, to make the order requiring the American to interchange traffic with the Southeastern at Washington under shippers' routing instructions, when such traffic originated at its exclusive offices in the East and was destined to exclusive offices of the Southeastern in the South, or when the traffic moved in the reverse direction. The rates were already in the tariffs, they applied under the tariffs without restriction in connection with the Southeastern via Washington, and under the tariffs, the shipper was given the right to route, as the Commission has specifically found and held.

The Commission ordered that the tariffs be obeyed, and that the routes be kept open and available under the tariffs as published. This requirement merely compelled the American to comply with its tariffs already published and on file, and likewise required that this situation be continued in the future and that the joint routes via Washington in connection with the Southeastern be kept open under the through rates already published, so that the ship-

per might designate in writing the route which he preferred as the tariffs provided he should have the right to do. Since, from a tariff standpoint, there were already joint through rates and routes established by the two companies applicable via Washington in connection with the Southeastern between *all exclusive offices* of the American Company in the defined Eastern territory, and *all exclusive offices* of the Southeastern on the main line of the Southern Railway Company between Washington and Atlanta, as well as on other lines of the Southern Railway System, over which the Southeastern operates, it is submitted that the Commission had ample power, in any aspect of the case, not only to require the through rates and routes to be continued and made available to shippers or consignees under routing instructions, but to require that joint through routes and rates in connection with the Southeastern via Washington be likewise made available to and from *common points* on the main line of the Southern Railway between Washington and Birmingham.

Under the tariffs, as they existed when the Commission made its order, there were no joint through rates between the exclusive offices of the American in the East and *common* or *competitive* points in the South, applicable in connection with the Southeastern via Washington. Unless such joint rates had been ordered under the situation then existing, the exclusive offices surrounding common points on all sides would have been accorded the use of the through routes and joint rates in connection with the Southeastern via Washington, and would have been permitted to use the competitive routes of either company;

while, common points such as Charlotte, Spartanburg, Greenville, Gainesville, Atlanta and Birmingham would have been denied the use of such joint routes and competitive service on either inbound or outbound traffic. This different treatment of exclusive offices and common points would have created, as the Commission points out in its original report, violations of Section 3 and 4 of the Interstate Commerce Act. To illustrate: There were joint routes and through rates available in connection with the Southeastern via Washington from New York to all local points on Southern Railway Company between Washington through Atlanta to Birmingham. The Commission found not only that these rates were in effect, but that under the tariffs as published, they applied without restriction in connection with the Southeastern via Washington. There were no joint rates, however, between New York or any other eastern points on the one hand, and such common points, as those just above named, on the other. The tariffs of the American, effective May 1st, 1921, owing to the restrictions placed therein by the American, destroyed the uniform application of the rates between all exclusive offices and common points, and did not provide for or permit any joint handling of traffic between common points and exclusive offices of either Company, but undertook to confine the movement of such traffic to the *single line service* of the company serving both the common point and the exclusive offices. For further illustration: Although the City of Atlanta has available the frequent passenger train express service of the Southeastern over the main line of the Southern Railway, nevertheless, owing to the restrictions placed in its tariffs by the American, no joint through rates were

applicable between Atlanta and any point north of Washington in connection with Southeastern through Washington.

Concerning this situation, and in declining to uphold or recognize the American's contention for the so-called "common to exclusive office rule" under which the use of single line routes only would be permitted between common points and exclusive offices, the Commission said in its original report (78 I. C. C., at page 132):

> "If traffic were delivered to the Southeastern at a common point, and if there were a direct joint route, then it would not be unreasonable for the Southeastern to participate in such traffic. Both companies would be on an equal footing if they competed for traffic destined to the other's exclusive offices. They should be allowed, however, to use only joint routes that are reasonably direct."

The Commission's order, as noted, requires the joint through rates, available under the uniform system of express rates, to be made applicable and protected not only between exclusive offices of the two companies with transfer to the Southeastern at Washington, but also between exclusive offices of the American in the defined eastern territory and *common points* located on the main line of Southern Railway between Washington and Birmingham. Taking the main line of the Southern which is embraced within the scope of the order, some of the principal common points are, as stated, Lynchburg, Va., Charlotte, N. C., Spartanburg and Greenville, S. C., Atlanta, Ga., and Birmingham, Ala., while some of the smaller common points between At-

lanta and Birmingham are Bremen, Ga., Anniston and Pell City, Ala.

Attention is now invited to the situation which would have been created had the joint through rates and routes ordered established in connection with the service of the Southeastern, with transfer at Washington, been limited to traffic moving between *exclusive* offices of the two companies, and had the *common* points been denied the use of such joint rates and through routes in connection with the Southeastern through Washington. Taking Charlotte, N. C., for example: There would have been joint through rates and routes via Washington between all exclusive offices of the Southeastern on the Southern Railway main line north and south of Charlotte, surrounding it on all sides, but no joint through routes or rates via Washington in connection with the Southeastern to or from Charlotte. Therefore, Gastonia, which is situated just south of Charlotte, or Greensboro, situated just north of Charlotte, could receive its express traffic from any eastern point by employing the Southeastern's service from Washington, thus obtaining the benefit of the frequent passenger train schedules handling express out of Washington over the main line of the Southern Railway, while the traffic moving to or from Gastonia or any other exclusive office south of Charlotte would be transported in these passenger trains directly through the city of Charlotte under joint through rates and billing. Charlotte, however, would be denied the use of the Southeastern's service except on *combination rates*, which would be materially *higher* to or from Charlotte, the intermediate competitive point, than the joint through rate applicable and available to or from

Gastonia, the more distant local point. Likewise, on *northbound* traffic, if the rates were available only between *exclusive* offices, Gastonia and Greensboro could use the Southeastern's service and schedules upon the frequent main line passenger trains operating over the Southern Railway from Atlanta and Charlotte to Washington, with transfer to the American by the Southeastern at Washington, under a through route and joint rate with through billing; whereas Charlotte, an important city directly intermediate to Gastonia and other exclusive offices, would be *denied* the use of that service except upon *combination* rates made up of the rate of the Southeastern from Charlotte to Washington and the local rate of the American Company from Washington to destination.

The same situation, had common points been excluded and denied the benefit of through routes and joint rates, would exist at all of the other main line common points such as Spartanburg, Greenville, Gainesville and Atlanta, as compared with the exclusive offices located north and south thereof. For the purpose of further illustration, take Spartanburg: Exclusive offices both north and south of Spartanburg could use in both directions the service of the Southeastern through Washington under joint through rates and routes with the American; whereas Spartanburg, an important city located on the main line of the Southern Railway, would have been denied the use of the frequent passenger train express schedules operated over the Southern Railway's main line between Washington and Atlanta, and would have had to send its outbound traffic and receive its inbound traffic solely over an electric line, namely, the Piedmont & Northern, op-

erating from Spartanburg through Greenville to Greenwood, where it connects with the Seaboard Air Line, in order to reach eastern territory and all points north of Washington.

Likewise, an analogous situation would be produced at Atlanta were Atlanta denied the use of through routes and joint rates in connection with the Southeastern, with transfer between the two express companies at Washington. Through rates would be in effect from all exclusive offices north of Atlanta and from all exclusive offices west of Atlanta on the line between Atlanta and Birmingham. Many of these local stations are in the same block as Atlanta, and take the same rates as Atlanta to and from eastern territory, under the Commission's uniform system of express rates. Were these exclusive offices or local stations, alone accorded the joint through rates and routes in connection with the Southeastern, and were this *joint* service denied Atlanta, these exclusive offices west of Atlanta would be accorded joint through rates to and from eastern points, which would be materially *lower* than the rates from Atlanta in connection with the Southeastern. That is to say, the local stations both north and west of Atlanta would have joint through rates applicable both in connection with the route of the American from or to Atlanta and also in connection with the route of the Southeastern through Washington; whereas Atlanta, if it wished to avail itself of the service of the Southeastern between Washington and Atlanta on traffic destined to, or coming from, exclusive offices of the American Company north of Washington, could only do so by paying the combination of local rates on Washington, which would be materially *higher* than the joint through rates ap-

plicable to and from exclusive offices north of Atlanta and west of Atlanta. Concerning this situation, the Commission pointed out, in its original report, 78 I. C. C., at page 142, that:

> "Express shipments from a Southeastern exclusive point to an American exclusive point move over a through route at a joint rate. From an intermediate common point, a shipment over the same route is assessed the combination rate, which is higher."

This, as the Commission points out, would constitute a departure from the provisions of the third and fourth sections of the Interstate Commerce Act. Furthermore, it would discriminate against the common points in favor of the exclusive offices because it would deny to the common points the use of the joint rates and express schedules made available to and from the exclusive offices surrounding the common points on all sides. Concerning this situation, the Commission said, in its report, 78 I. C. C., page 143:

> "Undue prejudice is said to result from the fact that between exclusive Southeastern points and exclusive American points through routes and joint rates apply, while between near-by common points and American exclusive points a shipper has access only to the American route in the absence of proportional rates; and from the fact that some common points are accorded joint routes to and from American exclusive offices and other common points are not."

After reviewing the entire situation, pointing out the resultant violations of Sections 3 and 4 of the Interstate Commerce Act produced by the then condition of

the tariffs and method of applying the rates, whereby the exclusive offices were accorded through routes and joint rates and common points were denied the use of such through routes and joint rates, the Commission then made the findings and conclusions, stated at page 143 of its original report, 78 I. C. C., which findings are quoted in another portion of the brief.

No order was entered by the Commission at that time, but, as stated in the supplemental report, 81 I. C. C., at page 247:

> "the express companies were expected to agree upon reasonable routes, and if necessary we were to pass upon the specific routes upon which they might fail to reach a satisfactory agreement."

As pointed out in the supplemental report, an agreement could not be reached between the two companies and the American Company in the meantime filed, to become effective on July 14th, 1923, a tariff which cancelled its restrictive schedules in part, so that the same rate would be in effect—

> "From all offices of Express Companies party to this tariff, to all offices of Express Companies party to this tariff, whether carried wholly by one Company or by two or more Companies, provided that the originating Company shall have the right to the long haul so far as that can be preserved to it without causing unreasonable delay in the delivery of the traffic to the consignee." (See 81 I. C. C., page 248.)

The Commission held in its supplemental report, after quoting the above provision from the proposed tariff of the American Company, that:

> "The proposed tariff would in effect nullify the provisions of rule 3 of the classification and would *not* be a compliance with our findings. Except with respect to shipments *from* common points to exclusive points, it would apparently not provide competitive routes over which the traffic could move, nor give to the shipper the right to route, except by the selection of the carrier to which he would give traffic at points of origin common to both companies." (Italics ours.)

The Commission then states, 81 I. C. C., at page 248:

> "The tariff has been suspended and the petition for reargument denied."

It will be noted from the quotations just made that the tariff filed by the American proposed to make the joint rates applicable *from* common points to exclusive offices. For example, from Birmingham, Atlanta, Greenville, Spartanburg, Charlotte or other main line common points on the Southern Railway via Southeastern to Washington and thence over the line of the American Company beyond Washington to its exclusive offices, for example, New York, Boston, Providence or any other eastern point. However, the tariff would have prevented the application of the joint rate and through route, if established and made available northbound, *in the reverse direction,* and the result would have been that, while the exclusive offices surrounding common points on all sides could have used the through routes and joint rates both northbound and southbound without limitation in connection with the Southeastern through Washington, the common points would have been restricted to the use of such joint routes on *outbound* or *northbound* traffic and

would have been *denied* the use of such joint routes and rates on *inbound* traffic.

The Commission points out in its supplemental report, 81 I. C. C., at page 249, that the American Company contended that it was unreasonable to establish joint routes *from* exclusive points on its lines to points common to both companies where it could transport the traffic over its own route from point of origin to final destination. It will be seen, therefore, that at the time the Commission made its supplemental report and entered its order, joint through rates in connection with the Southeastern through Washington were in effect between *exclusive* offices in both directions, and the joint through routes under these rates were available *under the tariffs as published* from the exclusive offices of one company to the exclusive offices of the other, but the American sought to deny to shippers the right to route their traffic so as to use the joint service in connection with the Southeastern via Washington, even on exclusive office traffic, and refused to permit traffic to move from one of its exclusive offices in the East to *any* office of the Southeastern in the South via Washington, even though routed by the shipper, unless it suited the American's purposes to transfer the traffic at Washington.

The American finally proposed, through the tariff provision last above quoted (and which tariff was rejected by the Commission), to make the through routes and joint rates applicable *outbound only* from common points, as well as from exclusive offices, in connection with the Southeastern via Washington, but undertook to deny, and insisted upon denying, to common points,

as well as to exclusive offices of the Southeastern, the right to use such joint through routes inbound, that is to say, on traffic moving from points north of Washington destined to Southeastern offices, and insisted that the company originating the traffic should have the right to handle via its long-haul junctions, irrespective of shipper's routing.

The Commission expressly held, as above stated, that this proposal submitted by the American and embodied in the proposed tariff provision above quoted "would in effect nullify the provisions of Rule 3 of the Classification, *and would not be a compliance with our findings.*" It was also pointed out that "except with respect to shipments *from common points* to exclusive points it would apparently not provide competitive routes over which the traffic could move, nor give to the shipper the right to route, except by the selection of the carrier to which he would give traffic at points of origin common to both companies." The Commission, as stated, rejected the proposed supplement and denied the petition for rehearing (81 I. C. C., at page 248).

Before making its supplemental report, therefore, the Commission had *again considered the situation* wherein common points were denied through routes and joint rates in connection with the Southeastern via Washington in either direction, and where, although joint through rates were published in the tariffs and held out to the public as available between exclusive offices, the exclusive offices were, by the action of the American, denied the use of such through routes and joint rates via Washington on southbound

traffic. When petitioned by the American to modify its findings and requirements so as to make the through routes and joint rates, applicable in connection with the Southeastern via Washington, available only on *northbound traffic*, that is, traffic originated by the Southeastern whether at its exclusive offices or at common points, the Commission declined to recognize or sanction any such evasion of the principles announced and requirements laid upon the express companies by its first report in this case, and thereupon made its supplemental report and the order attacked, specifically requiring and ordering the joint through rates and routes in connection with the Southeastern via Washington between the defined territory in the East and *all* points on the main line of the Southern Railway between Washington through Atlanta to Birmingham to be made available and kept open under shipper's routing.

The Commission has, therefore, declined to make distinctions and differences in the matter of such additional joint through routes and rates, (a) as between common or competitive points on the one hand and exclusive offices on the other, or (b) as between northbound traffic and southbound traffic, and (c) has likewise declined to permit the shipper's right to route and choice of competitive routes (which it has ordered established), to be disregarded.

In the light of the history of the proceedings before the Commission, the facts found in its reports, the existence of joint through rates established by the companies between their exclusive offices, and the absence of such joint through rates between exclusive

offices and common or competitive points, the fact that the restrictions originally made by the American upon the application of the rates destroyed the uniform system of rates promulgated by the Commission and substituted therefor rates made by combination on transfer points, it manifestly appears that, when it made its order in this case, the Commission considered and had in mind the discriminations and inequalities which were produced and the manifest violations of Section 3 which resulted from this chaotic rate situation brought about by the action of the American Company.

It is also indisputable that the tariffs as published by the American on May 1, 1921, were diametrically opposed to, and in conflict with, the system of rates promulgated and the fundamental principles laid down by the Commission in the *Express Cases*. All joint rates between common points and exclusive offices were thereby cancelled out. Routes theretofore extensively used, and in many cases exclusively used, when the American had the choice of all routes and which were and are the established and preferred pasenger routes, as well as standard routes for the carriage of the mails, were arbitrarily closed to all inter-territorial express traffic. Even where joint rates were left in effect between exclusive offices, the American arbitrarily insisted upon sending the traffic via its long-haul routes through interior and remote junction points, rather than permit the use of direct routes through protected and well-equipped border transfer points, such as Washington, and in so doing absolutely disregarded shipper's routing instructions and violated its published tariffs. These and other

unlawful and discriminatory practices in which it indulged in its effort to stifle competition created a situation which was comparable with the unsatisfactory conditions prevailing in express tariffs and practices prior to the decision of the Commission in the original *Express Cases* wherein the Commission said, in language quoted and reaffirmed in this case:

> "As a result of its investigation the Commission was convinced that if unbearable discrimination and confusion was to be avoided, its order must take into account the entire body of rates for express service. In this respect the express service is radically different from the services performed by the railroads in the carriage of passengers and property, and is more precisely comparable with the service performed for the public by the Post Office Department" (28 I. C. C., 129, quoted in 78 I. C. C. at pp. 138-139.)
>
> "Expedition is the very soul of the express business. We find, however, that it has been the custom of the express carriers, when shipments have been entrusted to them for delivery at points not on the lines of railroad over which they operate, to retain possession of the shipment *so as to receive the longest possible haul via their own lines.* The result has followed that many shipments have been carried by roundabout routes before being delivered to the final carrier." (24 I. C. C., page 392; quoted 78 I. C. C., page 138.)
>
> "For the cure of this most annoying and one of the most frequent causes of complaint against the express companies, they should be required forthwith to establish and jointly publish through routes between the principal points in the United States, which routes shall follow the main lines of travel, the most direct in point of time measured by the schedule of those passenger trains by which

normal schedules are observed." (24 I. C. C., at page 425; quoted 78 I. C. C., 138.)

"A new scheme of rate making must take the place of the present complicated rate structure. A system of through rates must be substituted for the present plan of making rates by way of transfer points, a scheme whereby it will be possible for the agent at the point of origin to obtain the proper through charges by reference to a simple schedule which will give the same rate from point of origin to destination, no matter by what route the shipment may travel and without reference to the number of carriers that may participate in the haul. As a preliminary to the adoption of such a system, it should be required of the carriers that they jointly establish and publish through rates between all points reached by the lines of the various companies. The performance of this task appears to be made possible only by the adoption of a system of blocks and zones such as is hereinafter described. * * * With the plan hereinafter suggested there can be only one rate between two points and thus by the elimination of combinations of locals the opportunity for error is reduced to a minimum." (24 I. C. C., pp. 391-392; quoted 78 I. C. C., 137.)

After quoting these and other findings made in the original *Express Cases*, and after pointing out that it was the purpose therein to treat all express companies as a unit forming one national express system, to have express move over direct routes and to make the same rate applicable thereto, regardless of the route over which it moved, the Commission said in this case (78 I. C. C. 139):

"The fundamental principles laid down in the *Express Cases* were prescribed at a time when there were 11 express companies. They should be followed now."

In view of these findings which have been reviewed at some length, it is difficult to understand how the majority of the Special Court could reach the conclusion that Section 3 of the Act was not involved or that the Commission had not found discrimination. The situation existing on and after May 1, 1921, by reason of the restrictions imposed by the American, through cancellation of rates and closing of routes, thus forcing the traffic via its long haul junctions through interior and remote transfer points, and compelling the use of combination rates to secure the benefit of the joint service of the two companies between common points and exclusive offices, was in all respects similar to that existing prior to the Commission's decision in the original *Express Cases* wherein the Commission found that "*unbearable discrimination and confusion*" existed, and wherein, after referring to the failure of the old system of express rates and the inequalities, discrimination and evils resulting therefrom, it was said (24 I. C. C., 434):

> "For the correction of these evils there has appeared to be but one remedy, the construction of a rate system that should cover the United States."

In the *Express Cases*, after having stated that the test of the express company as a public utility was at hand and that it was not to be expected that, even with an investigation as extended as that conducted in the *Express Cases*, all causes of complaint would be removed, the Commission enumerated certain fundamental requirements as absolutely essential to be complied with by the express companies, and among others, it was specifically required that the

express companies adopt the new and simplified method of stating rates therein prescribed, and, further, that "express carriers must unite in direct through routes, reaching all cities and towns accessible to each other by the shortest route measured in time." (24 I. C. C., 433.)

It was further found that many customs and practices of the express carriers must be discontinued, and among others condemned and required to be eliminated was "a custom of the express carriers, when shipments have been entrusted to them for delivery at points not on the lines of railroads over which they operate, to retain possession of the shipment so as to receive the longest possible haul via their own line." (24 I. C. C., 392.)

In stating the standard of rates and certain conclusions reached with respect thereto, it was stated as the fourth conclusion "that an express rate may not be based upon the monopoly right of the express company to be the exclusive freight forwarder over one or more lines of railroad." (24 I. C. C., 431.)

When it was found that in utter disregard of these principles the American Company had brought about the situation resulting from the action which it took on May 1st, 1921, it does not seem possible to conclude that violations of Section 3 were not involved, because glaring instances of such violations are brought about by the denial to common points of the joint through routes and rates accorded to exclusive offices located on all sides of such common points, to say nothing of the violations of Section 4 resulting therefrom.

Specific attention is called to this situation in the original report in this case (78 I. C. C. at page 143).

Furthermore, the American undertook to determine, arbitrarily and to suit its own purposes, what traffic it would transfer to the Southeastern at Washington. In other words, certain shipments would be transferred to the Southeastern at Washington; whereas other traffic, although so routed by the shipper as to require such transfer, would nevertheless be held in the American's own service and the shipper's instructions would thereby be disregarded, thus again violating Section 3 as well as Section 6.

Confronted with a situation where joint through rates were in effect between exclusive offices of the two companies applicable without restriction in connection with the Southeastern via Washington and under which, as to some traffic the American was making transfers to the Southeastern at Washington, while on other traffic—and by far the greater part of the total—it was disregarding shipper's routing instructions and its published tariffs; and likewise confronted with the further fact that there were no joint through rates to or from common or competitive points in the South and exclusive offices of the American in the East, it is difficult to conceive how the Commission could have done otherwise than make the requirements and the order which it did. It found not only that specific provisions of the Interstate Commerce Act were being violated, but that the chaotic condition resulting was utterly destructive of the fundamental principles underlying its system of express rates, would destroy the uniform application of those rates,

and revive many of the inequalities and evils formerly existing and which had theretofore been corrected and eliminated by the system of rates promulgated, and the action taken by the Commission in the original *Express cases.* Its order in the instant case requiring the uniform application of rates to be restored and the through routes kept open, as that system required and as it found the public interest imperatively demanded, was clearly necessary and imperative under Section 3, as well as other provisions of the Act, even conceding that the limitation imposed by Paragraph 4 of Section 15 were applicable to an express company.

Even in cases where the power of the Commission to establish through routes and joint rates in connection with "carriers by railroad" is restricted by Paragraph 4 of Section 15 so as to protect the long haul of the originating carrier by railroad handling freight, it has been repeatedly held, even prior to the amendment of March, 1920, and subsequent to the amendment of June 18, 1910, that the Commission had full power and authority, notwithstanding such limitation, in the case of a carrier by railroad, to require the establishment of additional through routes and joint rates in order to avoid and cure discrimination, and prevent undue prejudice against other connecting carriers or against persons or communities which were denied the benefit of the through routes and joint rates.

The Commission has repeatedly held that the practice of maintaining joint rates and through routes from one point or section while denying such joint rates and through routes from other neighboring points or sections constitutes undue discrimination forbidden by Section 3 of the Act.

Oklahoma Portland Cement Co. v. *A. L. & G. Ry.*, 32 I. C. C. 221, 225;

Wisconsin-Arkansas Lumber Co. v. *St. L. I. M. & S. Ry. Co.*, 33 I. C. C. 43;

Lumber Rates from Texas, Louisiana & Arkansas, 28 I. C. C. 471;

Switching Charges on Coal and Coke, 32 I. C. C., 444, 448;

Alexandria Chamber of Commerce v. *M. P. R. R. Co.*, 53 I. C. C. 311;

Strasburg Steam Flouring Mill v. *Southern Ry. Co.*, 38 I. C. C. 52, 57, and 58 I. C. C., 337.

In the case last cited it was said, at 58 I. C. C., page 339:

> "If defendants provide for transit at Lynchburg and Danville on the basis of the through rates on the products from Chicago, plus a reasonable transit charge, they should be required to provide for transit on the same basis at Strasburg and other milling points on the direct through route * * * By according lower total charges on wheat milled at Lynchburg than on wheat milled at Charlestown, Winchester and Strasburg defendants are subjecting millers located at Charlestown, Winchester and Strasburg to undue prejudice and disadvantage."

In *Rates on Grain Milled in Transit at Lawrenceburg, Ind.*, 35 I. C. C. 27, at page 32, it was said:

> "By forming through routes and publishing through rates applicable thereto, both of these carriers have merged their lines into one route, or line, so far as the particular traffic covered by these through rates is concerned. As a single through route or line, they cannot withhold from some points on that route valuable services which they voluntarily perform at other points on that route."

The majority of the cases just cited were decided prior to the passage of the Transportation Act, 1920. And they were decided in the light of the restrictive provision contained in Section 15 as it stood after the amendment of 1910. The limitation therein imposed on the power to prescribe through routes now contains an express proviso, which proviso is "except as provided in Section 3," and was engrafted upon paragraph 4 of Section 15 by the Transportation Act, 1920. In other words, where the provisions of Section 3 of the Interstate Commerce Act come into play, or where Section 3 would be violated, then the limitation prescribed in Paragraph 4 of Section 15 does not apply, even in the case of carriers by railroad. Section 3 of the Interstate Commerce Act is the section which forbids unjust discrimination or undue prejudice. As the law now stands, there is an express declaration by Congress that the limitation shall not apply or restrict the Commission's power where it is necessary for the Commission to order or require the establishment of through routes to prevent unjust discrimination or undue prejudice.

Even prior, however, to the insertion of the words "except as provided in Section 3" in the restrictive clause, this Court had expressly upheld the power of the Commission, even in the cases of carriers by railroad, to establish through routes and joint rates in order to remove discrimination and prevent a situation arising which would constitute a violation of Section 3 of the Act. See *St. L. S. W. Ry. et al* v. *U. S., et al.* 245 U. S. 136

If it be conceded, therefore, that the order is valid as to the through routes and joint rates between ex-

clusive offices, the Commission was compelled to include common points in order to prevent unlawful discrimination, and, what is more important still, to prevent the uniform application of the national system of express rates which it had promulgated from being broken down and destroyed and the old practices of the express companies, which it had condemned in the *Express Cases,* from being revived

If it be urged that the injunctive order expressly reserves to the Commission "the right * * * to make further inquiry and to establish such through routes in the territory involved as shall be within the exceptions and provisos of Paragraph 4 of Section 15 of the Interstate Commerce Act and not in conflict with the prohibitions of said section as set forth in the opinion and judgment of this Court," it is only necessary to answer that even under the construction placed on Paragraph 4 of Section 15 by the majority, the appellee, American Company, could not claim the protection thereof if Section 3 of the Interstate Commerce Act were involved. The conclusion cannot be escaped that the Commission found specific violations of Section 3 to exist. It so states in its report, and further points out that the situation resulting and with which it is called upon to deal is analogous to that which existed prior to its decision in the *Express Cases,* contravenes the fundamental principles therein announced which are reaffirmed and declared to be controlling and decisive of the questions here presented.

As has been explained, during the interim between its first report in this case and its final report and

order, when the tariff proposed by the American pending the action of the Commission on its petition for reargument and the final disposition of the case was considered, and when the question was narrowed to the establishment of through routes and rates *from* common points to exclusive offices *northbound* in connection with the Southeastern via Washington, but the *denial* of such through routes and joint rates southbound was proposed to be continued and perpetuated, the Commission declined to sanction any such limited or partial compliance with the requirements of its original report, and in its supplemental report held, in substance, that the situation could only be met and adequately dealt with by following and complying with the principles laid down in its first report, which were reaffirmed and restated in its supplemental report, and which are therein, briefly summarized, substantially as follows:

(a) It was necessary and desirable in the public interest that additional reasonable and direct through routes and joint rates be maintained between points on the lines of the American and points on the lines of the Southeastern;

(b) That the rates between any two points should be the same regardless of the route over which a shipment might move or the number of lines over which it might travel;

(c) That joint through routes should be established, in instances where they would result in reasonable direct routes, so that there would be at least two reasonable direct routes, between such points, one of which

should be via the transfer point selected by the Southeastern and the other via the transfer point selected by the American; and

(d) That the tariffs should provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings.

Should those requirements be complied with, the difference between the joint rates and through routes accorded exclusive offices, as compared with common points, would disappear. The common or competitive point, as well as the exclusive office in its vicinity, could thus utilize the service of the Southeastern to and from Washington on inter-territorial traffic, and the rate would be the same from the common and competitive point via this route as from the more distant or from an intermediate exclusive office within the same block, thus avoiding fourth section violations and eliminating the discriminations whereby the intermediate common point could only avail itself of the joint route via Washington by paying the full combination on Washington, while the more distant exclusive offices had the benefit of a joint through rate lower than the combination rate from the intermediate common or competitive point, and this, notwithstanding the fact that traffic from the more distant exclusive office moved on the joint through rate directly through the common point paying the higher combination rate.

The Commission then said in its supplemental report that it was apparent an order was necessary to

make effective the principles it had announced, and that:

> "We shall at this time by order prescribe certain through routes and joint rates with respect to which the record warrants the finding that they are reasonable and will require their establishment, reserving for further consideration either upon the present record or upon further hearing the establishment of additional routes." [81 I. C. C. 250.]

The report then states the specific finding that it is necessary and desirable in the public interest that through routes and joint rates applicable thereto be established between the defined territory in the East and *all points* on the main line of the Southern Railway from Washington to and including Birmingham, with transfer between the two companies at Washington, and that—

> "* * * the rates contemporaneously applicable between the above named points over routes now used are, and for the future will be, just and reasonable rates for application over the routes herein prescribed.
> "* * * that the tariffs should provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed." [81 I. C. C. 250.]

When it is remembered that the joint rates and routes were already published in the tariffs subject to shipper's routing between the exclusive offices of the two companies; that as the tariffs were originally published the joint rates and through routes were *not* available between common or competitive points and

exclusive offices, and that as between exclusive offices some traffic was accorded the benefit of the Washington transfer and the joint service in connection with the Southeastern via Washington, while the vast majority of such traffic was denied this privilege, and that when the question was narrowed by the *ad interim* proposal of the American to establish *from* the common or competitive points the joint rates northbound, but to withhold and deny such joint through routes to the common and competitive points as well as to the exclusive offices on southbound traffic, it is apparent that the majority of the lower Court fell into error in apparently assuming that Section 3 was not involved and was not considered by the Commission in dealing with this problem.

The findings of the Commission amply show unjust discrimination as between localities, members of the shipping public, and different classes of traffic, and the Commission dealt with such discriminations effectually when it announced the controlling principles laid down in its original report and reiterated in its supplemental report, as the only effective and adequate way in which to cure the situation. How could the lower Court, in the face of such a record, determine that Section 3 was not involved, unless it be for the technical reason that the Commission, while finding facts which constituted specific violations of that section, and while stating that the facts so found were alleged to constitute violations of Section 3, did not state that its order was based upon Section 3? We respectfully submit that such a strained and hypercritical view of the order cannot be upheld or furnish a valid ground for injunction or for sending the interested parties back to the Commission when that

body has so recently and so fully announced and reaffirmed the principles laid down in the *Express cases*.

The principles announced and the findings made by the Commission in its reports in this case give effect, and are intended to give effect, to Section 3 as well as to the other provisions of the Act. What the majority of the lower Court overlooks is that the Commission in this case made the finding which it made in the original *Express cases,* namely, that the only solution was the system of rates which it had therein prescribed; that the Commission in this case found the same evils, inequalities, inconsistencies and discriminations resulting from the chaotic rate situation brought about by the restrictions imposed by the American, as it had found in the original *Express cases,* wherein it declared that "for the correction of these evils there has appeared to be but one remedy," and that "if unbearable discrimination and confusion was to be avoided" the uniform system of rates and direct through routes therein promulgated must be established and maintained.

The erroneous conclusion reached by the majority of the Court was apparently superinduced by failing to realize that in making the order which it did make the Commission was but restoring the system of rates which it had theretofore promulgated for all express companies, and was making them applicable via all reasonable direct routes to respond to the requirements of a service "radically different from the service performed by the railroads in the carriage of passengers and property, and one more precisely comparable with the service performed for the public by the post office department." (28 I. C. C., at page 139.)

No one can read the original decisions in the *Express cases* without realizing that the Commission was there moved to inaugurate its national system of express rates with uniform through routes by reason of the widespread and unjust discriminations which it found permeated the old system, as well as to make the carriers by express perform the functions which they held themselves out to perform, and to render the rate fabric so flexible that the dispatch and expedition in transportation, which the Commission found was "the very soul of the express business," might be secured through the combination of passenger-train schedules and the utilization of established passenger routes usually employed in handling the mails.

When the Commission found in its original report in this case, after reviewing and quoting the fundamental principles announced in the *Express cases,* and citing the remedies there applied, and after having considered the situation developed in this case, that—

> "taking all of these things into consideration and the fundamental principles laid down in our two decisions in the *Express case,* we find as fact that it is in the interest of the public to order established reasonable direct joint express routes,"

can it be said that the fundamental principles laid down in the original *Express cases* were not considered and were not a basis for the finding in this case and for the order which the Commission made?

As further demonstrating that the Commission had in mind, as moving it to action in this case, the principles announced in the original *Express cases,* we find it, in its first report in this case, using this language:

"Because the American has worked out other reasonable routes is not a sufficient reason for permitting reasonable routes in connection with the Southeastern to be closed. The fundamental principles laid down in the *Express case* were prescribed at a time when there were 11 express companies. *They should be followed now.*" (Italics ours.)

Point 4.

CONCERNING THE INTERVENTION OF THE SEABOARD AIR LINE RAILWAY COMPANY.

If This Railway Company, and Not the Express Company, Is the Real Party in Interest, Then No Right Which It Legally Possesses Is Invaded by the Order.

While not a party to the proceeding before the Commission, the Seaboard Air Line Railway intervened in this case, taking the position that, so far as the movement of express over its lines is concerned, the American Company is merely its agent, and the Seaboard, it is claimed, is the real party in interest. Obviously, appellees were doubtful of their position and apprehended that, unless they could in some way bring the railroads into the case, there was no substantial ground upon which they could invoke the protection of paragraph 4, Section 15 of the Act. Thereupon, the Seaboard was introduced through this intervention for the purpose of getting at least one carrier by railroad before the Court, to lend some support to the theory that the Court must disregard the shadow and look to the substance, treating the express company merely as the agent of the railroads, and the latter as the real parties in interest.

When counsel for appellees take this position and bring forward the separate railroads over which the

American operates by virtue of its contract, declaring that the railroads are the real parties, and the express company merely their agent, so as to invoke the protection of the limitation contained in paragraph 4 of Section 15, they find themselves in as great a dilemma as when they feature the express company as the real party in interest. This is perfectly obvious because the restriction claimed does not operate, and cannot be invoked, where Section 3 is involved as has just been pointed out in considering another branch of the case.

Paragraph 3 of Section 3 expressly forbids discrimination between connecting lines as follows:

> "All carriers, engaged in the transportation of passengers or property subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, *and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.*" (Italics ours.)

Where the provisions of Section 3 come into play, or where a situation arises which would contravene or violate the provisions thereof, the restriction contained in paragraph 4 of Section 15 does *not* apply because the limitation named in said paragraph 4, as hereinbefore pointed out, is expressly subordinated to the provisions of Section 3 by the language appear-

ing in parenthesis in said paragraph 4 of Section 15, being in part as follows, "except as provided in Section 3."

The inhibition contained in paragraph 3 of Section 3 against discriminating or unduly prejudicing connecting lines has been applied in numerous cases by the Commission where a carrier sought to withhold joint rates or through routes from certain carriers, while applying and operating the same with other connections. In those cases, the Commission has uniformly held that a carrier could not rely solely upon a technical construction of the limitation contained in Section 15, paragraph 4, of the Act without any regard to the intendment of the Act as a whole, but that such limitation must be read in connection with Sections 1 and 3, as well as with the other provisions of the Act. As pointed out in another section of this brief, it is a striking feature and particularly significant in the light of these decisions, and probably as a development thereof, that in amending, in 1920, paragraph 4 of Section 15, Congress subordinated in express terms said paragraph 4 to the provisions of Section 3. Prior to March 1st, 1920, and the amendment above noted, this question was fully considered in *Flour City S. S. Co.* v. *L. V. R. R. Co.* 24 I. C. C. 179, and this decision has been followed in numerous other cases, some of which are as follows:

Lumber Rates, Oregon and Washington and Eastern Points, 29 I. C. C. 609;

Pacific Navigation Co. v. Sou. Pacific, 31 I. C. C. 472;

Western Pacific Railroad Co. v. S. P. Co., 55 I. C. C. 71;

Chicago, Lake Shore & S. B. Ry. Co. v. Director General, 58 I. C. C. 647;
Gillespie Coal Co. v. I. T. S., 62 I. C. C. 335.

In the *Gillespie Case, supra,* which was decided after the amendment of March 1st, 1920, it was said, at page 337:

> "It is urged that as Gillespie is served by lines of the New York Central system, any order requiring that system to establish through routes and joint rates would result in short-hauling it in contravention of Section 15 of the interstate commerce act. We have, however, frequently held that carriers may not rely upon a technical construction of one portion of the act to justify a violation of another provision, and that, in determining a question such as that involved here, consideration must be given not alone to Section 15, but also to the provision of the act which makes it the duty of carriers to establish through routes and just and reasonable rates and charges applicable thereto, and that which forbids undue prejudice with respect to the interchange of traffic between connecting carriers. *Chicago, Lake Shore & S. B. Ry. Co.* v. *Director General,* 58 I. C. C., 647, 652 and cases cited."

While the first paragraph of Section 3 provides primarily for the equal treatment of shippers or localities, paragraph 3 of the same section forbids any discrimination among connecting lines, or any undue prejudice against connecting lines in the distribution of traffic that is not specifically routed by the shipper.

In *B. R. & P. Ry.* v. *Penna. Co.,* 29 I. C. C., 114, the defendant company refused to transfer for complainant, interstate carload shipments of freight from and

to industries on defendant's lines within the switching limits of the city of Newcastle, Pa., although it transferred similar traffic for three other carriers serving the same point. The Commission found that the refusal of the defendant to accept from, and to move to, complainant's line carload shipments of freight within the switching limits of Newcastle, while performing like service in connection with the other carriers within said switching limits, was unjust discrimination and violated the provisions of Section 3. The order of the Commission was attacked by the Pennsylvania Company in the District Court but was upheld by the lower court as well as by this Court; *see Penna. Co.* v. *U. S.*, 214 Fed., 445; *Penna. Co.* v. *U. S.* 236 U. S. 351.

While the case last cited involved terminal handling within switching limits, nevertheless, as pointed out in the decision of the Commission in *Pacific Navigation Co.* v. *Southern Pacific Co.*, 31 I. C. C. 472, this provision of Section 3 is not confined to a regulation of terminal transportation. It not only provides for the receiving and delivering of traffic by connecting carriers, *but also for the forwarding of passengers and property and the interchange of traffic in general.*

It is at once apparent that when appellees seek, by a strained construction, to bring the American Company within the protection of paragraph 4 of Section 15, under the guise of the contention that the separate carriers by railroad are to be considered as the real parties in interest, counsel are at once confronted with the discrimination which would result and the manifest violations of Section 3 of the Act which would in-

evitably occur if it be once conceded that the American has no legal status as a carrier by express but is merely the agent for each of the several carriers by railroad over which it operates, to the end that its legal entity is to be found only in the separate entities of each of the railroads with which it has contracts. Therefore, when appellees attempt to escape the effect of the decision of this Court in *Wells Fargo Co.* v. *Taylor, supra,* and to place the express company under the protection of paragraph 4 of Section 15, by eliminating its identity and substituting therefor the separate railroads over which it operates, they encounter equally as great difficulties as when the American appears in its true light as a carrier by express.

This is true because the Pennsylvania or the Baltimore & Ohio operating between New York and other eastern cities on the one hand, and Washington on the other, where they connect not only with the Richmond, Fredericksburg & Potomac Railroad, but directly with the Southern Railway Company, could not legally be permitted to establish and maintain through routes and joint rates, interchanging traffic thereunder, with the Richmond, Fredericksburg & Potomac Railroad operating in conjunction with the Seaboard, and deny like through routes and joint rates and interchange of traffic to the Southern Railway Company without violating the express provisions of Paragraph 3 of Section 3 and without discriminating unlawfully against the Southern Railway Company.

When the American Company, is, therefore, dissolved into its separate constituent railroads, and such railroads are treated as the real parties, a situation is

presented where the lines of Southern Railway Company from Washington south are a potent factor in the competitive handling of freight and passengers, and these lines can no more be denied participation in the handling of express under through routes and joint rates via Washington under the Interstate Commerce Act than they can be denied participation in the handling of through interline passengers and freight. In other words, when the American Company, having contracts with separate railroads, through *their status* claims immunity for its alleged long hauls, it can only do so in the aspect of the separate railroad entities which are subject to the requirements of the Act dealing with, and applicable to, them as separate and independent railroads.

Furthermore, what the American Company is claiming under the guise of the Seaboard Air Line Railway, or in behalf of the Seaboard Air Line Railway, is to handle traffic from eastern territory destined *to exclusive offices at local points on the Southern Railway* over the Seaboard Air Line from Washington to the junction point nearest the exclusive office destination. In other words, the American Company, in the guise of the Seaboard Air Line Railway, and by virtue of its pooling arrangement having control of all of the railroads north of Washington, seeks to confine the movement of express traffic brought to Washington over the Pennsylvania and the Baltimore & Ohio to the rails of the Seaboard Air Line, even though such traffic is destined *to exclusive Southeastern offices on the main line of the Southern Railway,* and to force this exclusive office traffic to flow over the Seaboard Air Line Railway to the junction point nearest destination on

the Southern Railway, thereby *diverting* traffic from the main line of the Southern Railway to the Seaboard Air line to be handled by the latter through remote interior junction points and placed finally upon the rails of the Southern Railway and in the service of the Southeastern to reach destination. Such an arrangement gives to the American, or to the railroads combined under its contract, the maximum haul in all instances, and allows the Southeastern the absolute minimum.

Let us analyze the situation a little further to show how preposterous the claim of appellee, Seaboard Air Line Railway Company, really is. That company's rails terminate at Richmond, Virginia. It does not reach Washington with its own rails, nor does it cross or intersect the main line of the Southern Railway at any point south of Richmond until Atlanta is reached. Stripped of every disguise, the bald claim is asserted by appellee, Seaboard Air Line Railway Company, that the route of the Southern Railway Company from Washington to points on the latter's main line between Washington through Atlanta to Birmingham should be absolutely closed for the handling of all express traffic to or from the East, to the end that such traffic may be brought from Washington by the Richmond, Fredericksburg & Potomac Railroad Company to Richmond and there delivered to the Seaboard to be handled by it to Raleigh, where a portion would be transferred to the Southern for further handling in local trains in order to reach destinations located on Southern Railway's main line north and south of Greensboro, North Carolina; that it should be permitted to handle other traffic to Monroe, N. C., and

there transfer it to Seaboard local trains for further handling to Charlotte, where it would be transferred across town to Southern Railway trains for distribution to points north and south of Charlotte. Again, another part of such traffic, destined to points on the main line of Southern Railway in the vicinity of Spartanburg and Greenville, S. C., would be carried by the Seaboard to Greenwood, S. C., and there transferred to an electric line, known as the Piedmont & Northern, for further handling on trolley cars to Greenville and Spartanburg, where it would be transferred to Southern Railway trains to be carried thence to destination. Likewise, for Southern Railway points between Gainesville and Atlanta, or between Spartanburg and Atlanta, it is sought to have the Seaboard handle the traffic to Atlanta and there deliver it to Southern Railway trains to be back-hauled over its main line to points north.

This is not only what the Seaboard claims, but these are the routes actually used by the American in handling traffic from the East destined to exclusive offices of the Southeastern on the main line of the Southern Railway, in order that the American may secure its maximum haul and afford the Southeastern its absolute minimum haul. It was this situation which the Commission found and which it sought to remedy by providing alternate routes which, under shipper's routing, would make available to all of this main-line territory on the Southern Railway the frequent passenger train schedules of the Southern Railway operated from Washington and handling express to all main-line points through Atlanta to Birmingham.

In its first report, pages 134 and 135, the schedules of the passenger trains of the Southern Railway Company handling express from Washington for the South are set forth, as well as the schedules and routes used by the American in reaching the territory served by the lines of the Southern Railway in North and South Carolina. It will be noted that the Southern Railway Company had, at the time said report was rendered, four through trains handling express between Washington and Atlanta and intermediate main-line points, as well as for connecting lines, and that there were other Southern trains handling express out of Washington, which also carried express to intermediate points, as far south as Charlotte; so that according to the report there were at least five or six south-bound trains daily over the Southern Railway handling express from Washington and points beyond to Charlotte, N. C., and points intermediate, and four daily trains handling express from Washington and points beyond to Atlanta and points intermediate, as well as for points beyond Atlanta (78 I. C. C., 134, 136).

The statement of the schedules set forth in the Commission's original report shows that the American Company attempts to serve all of this Southern Railway territory (whether local or common points) by the use of its so-called special express train out of Washington over the Richmond, Fredericksburg & Potomac and the Seaboard at 6:25 A. M., scheduled to arrive at Atlanta at 6 A. M., the following morning, and to transfer traffic at such points as Raleigh, Monroe, Greenwood and other intermediate main-line points on the Seaboard Air Line Railway from this special train to other connecting trains for further

transportation in the American's service to interior junctions with the Southeastern. For example, as shown at page 135, the American sends traffic, when destined to Southeastern offices in North Carolina located on the Southern Railway between Raleigh and Greensboro, between Mount Airy and Greensboro, between Danville and Biltmore, through Raleigh for transfer there to the Southeastern. Likewise, the American brings traffic, to be transferred to the Southeastern at Charlotte, on its special train out of Washington to Monroe, N. C., twenty-five miles southeast of Charlotte, and then has to transfer such traffic in its own service for further transportation from Monroe to Charlotte, where it has to be interchanged with the Southeastern through a cross-town transfer. The American thus undertakes to distribute through Charlotte, with transfer to the Southeastern at Charlotte, for points on the main line of the Southern Railway to and including Salisbury; to, but not including Winston-Salem, N. C., to, but not including, Taylorsville, N. C.; to, but not including Spartanburg and Chester, S. C.; from Rock Hill, S. C., to, but not including Marion, N. C.; from Gastonia, N. C., to and including Edgemont, N. C.

It further appears, from page 135 of the original report, that the American Company handles Spartanburg traffic and traffic to be distributed through Spartanburg by transfer to the Southeastern at that point, on its special train out of Washington, as far as Greenwood, S. C.; at Greenwood this traffic is transferred in the American's service from the Seaboard train to the Piedmont & Northern, an electric line, to be further transported in its service to Spartanburg via Bel-

ton and Greenville, S. C. Upon arrival at Spartanburg the traffic must be transferred through a cross-town transfer via wagon or truck haul from the depot of the American to the depot of the Southeastern.

The foregoing illustrations, set out in the Commission's original report, indicate the manner in which the American attempts to employ its own service from Washington to Atlanta to handle not only Atlanta traffic, but traffic destined to exclusive offices of the Southeastern and common points located on the main line of the Southern Railway intermediate between Washington and Atlanta and West of Atlanta on the line of the Southern Railway between Atlanta and Birmingham. They further serve to illustrate the fact that express traffic destined to points on the main line of Southern Railway between Washington and Atlanta has to be transferred from this special train to other trains of the American for further transportation to interior transfer points, where, in turn, the traffic is again transferred to the Southeastern for further transportation beyond in its service to final destination.

In all such cases, as pointed out by the Commission in its original report, pages 132-135, were the traffic transferred to the Southeastern at the border transfer point of Washington, it would make quicker time in reaching destination and there would be a much wider margin of certainty of delivery to consignee than where the effort is made to serve this Southern Railway main-line territory through the routes employed by the American in connection with its special train service. In this connection, at page 136 of the original report, the Commission said:

"No attempt has been made to give the local schedules from these interior transfer points. The American contends that in the vast majority of cases it makes each schedule, while the Southeastern argues that in most instances the present method of handling results in delaying the express. *In many cases a substantial saving of time in actual performance could be accomplished by the use of joint routes through border points or transfer points allowing the American a somewhat shorter haul. Transfers at points requiring cross-town transfer or at interior points where facilities are limited and inferior to those at larger junction points often cause delay and damage.*" (Italics ours.)

What the Commission points out is that as quick and reliable service cannot be secured over routes of the American Company involving the use of interior and unprotected transfer points, requiring cross-town hauls and the employment of local schedules of the American which do not connect with the schedules of the Southeastern, as can be secured by transferring the traffic to the Southeastern's service at Washington, a protected transfer point requiring merely platform transfer, and from which point the traffic would move in through trains to main-line destinations on the Southern Railway, which schedules in turn connect with schedules over the branch lines or other divisions of the Southern Railway, under the system of through passenger schedules operated by that company between points on its own line.

This is the situation which the Commission found to exist and to have been brought about by the fact that the American closed and refused to permit to be

used the routes of the Southeastern over the Southern Railway to and from Washington to reach points on the main line, or on other lines of the Southern Railway, on and after May 1, 1921, when the Southeastern began operations, although prior to that time as repeatedly stated, the routes then discontinued had been preferentially used by the American when it had access to all routes. The Commission's order, as has been explained merely requires the joint routes via Washington in connection with the Southeastern to be kept open to traffic between defined territories in the East and points on the main line of the Southern Railway south of Washington through Atlanta to Birmingham. It does not require that the routes used by the American through interior transfer points be closed, but does give the shipper the benefit of the more direct competitive routes and the more frequent train service available from Washington over the main line of the Southern Railway to reach Southeastern offices.

In this situation, it is remarkable to say the least, that appellee, Seaboard Air Line Railway Company, should conceive that it has any standing to challenge the power of the Commission to make available the service of the Southeastern over the main line of the Southern Railway to reach offices of the Southeastern located on the Southern. The Seaboard has no long hauls which are infringed. It is merely an intermediate carrier, but if the problem is to be looked at from the standpoint of the railways, its claim is tantamount to the bald assertion that the Southern Railway should be denied an opportunity to compete with it for inter-territorial traffic moving between the East

and competitive points, and should be denied the use of its own rails from Washington, not only on such competitive traffic, but even on traffic destined to the Southern Railway Company's own local territory; a mere statement of the claim furnishes its refutation.

Point 5.

There Can Be No Doubt Concerning the Power of the Commission to Provide for Shipper's Routing as a Part of Its Order Establishing Through Routes and Joint Rates.

All members of the Special Court were in unity and agreement that none of the grounds invoked for injunction, which were passed upon, would warrant the grant save that the majority of the Court held to the view that appellee, American Railway Express Company, was a "carrier by railroad" within the terms of Paragraph 4 of Section 15, and that the limitation in such section was violated by the order of the Commission.

Circuit Judge Bryan unequivocally held that the Commission had the right to provide for shipper's routing as a part of its order. The majority of the Court indicated a predisposition to the same view, but such majority did not definitely pass upon the point, deeming it unnecessary so to do because they had concluded that the order should be enjoined as violative of Paragraph 4 of Section 15 and the limitation thereby prescribed.

Upon the possibility that appellees may urge that inasmuch as the entire Court did not adjudicate the validity of the provision of the order in regard to the rights of a shipper to route, and that appellees may

insist that this particular question is open to consideration and review in this, the appellate Court, because not passed on adversely to them by the majority of the lower Court, we will briefly undertake to demonstrate that Judge Bryan is clearly correct in upholding the validity of the Commission's order with respect to shipper's routing.

Counsel for the American Company contended before the Commission and in the lower Court that if the words "carrier by railroad," as contained in Paragraph 4 of Section 15 be construed not to include express companies, then it must likewise be held that the words "railroad corporation being a common carrier," appearing in paragraph 8 of the same section, were not applicable to express companies. Therefore, it was urged that shippers of express had no statutory right to designate the routing of their shipments and could not legally be given such right by the Commission. This argument completely ignores the broad and comprehensive powers conferred upon the Commission by Paragraph 3 of Section 15, which powers include not only the establishment of through routes and joint rates "whenever deemed by it (the Commission) to be necessary or desirable in the public interest" but "*the terms and conditions under which such through routes shall be operated.*"

Paragraph 3 Section 15 applies to all carriers subject to the Act, including express companies. There is no restrictive or qualifying language such as appears in paragraphs 4 and 8. By paragraph 3, Congress left to the Commission to determine when such joint rates and through routes were necessary or de-

sirable in the public interest and likewise the terms and conditions under which such through routes should be operated. Under the power to prescribe terms and conditions, the Commission clearly has the right and power to authorize the shipper to select the route he prefers. Any other construction would lead to the conclusion that it is made mandatory upon the Commission to establish the joint rates and through routes whenever deemed necessary or desirable in the public interest and, at the same time, to say that the shipper could not be empowered or authorized to select and utilize the route so prescribed for his benefit and in his interest.

It was decided by the Commission in the original *Express cases* that the shipper should have the right to route under the system of rates therein ordered established, and this requirement was written by it into the classification which it prescribed. Therefore. in the *Express Cases,* as one of "the terms and conditions under which such through routes should be operated" the Commission required that shippers' routing instructions should be obeyed. The system of rates when promulgated was ordered established by the Commission between all points and over all express companies, and it was therefore entirely feasible to require shipper's routing to be respected and obeyed in connection with the joint rates and through routes so established. They were joint rates and through routes ordered established by the Commission and in connection with which it was empowered to prescribe terms and conditions governing the operation thereof.

In the *freight service,* where a uniform system of joint through rates between all points applicable over the freight carriers as a unit does *not* exist, as was made the case in the express service by the Commission's order in the *Express Cases,* a different situation prevails. Freight rates via different routes may, and do, vary. Joint rates and routes are frequently initiated and established by the carriers applicable only over certain lines via certain junction points, and not applicable over other routes. Such joint routes in the freight service are established by the carriers from time to time between specific points or sections and are in no sense universally applicable to the extent or in the manner required by the Commission with respect to express rates and through routes in the *Express Cases.* The freight rate structure is largely one initiated by the carriers, and many joint rates, and the designated through routes over which they apply, are established from time to time by agreement between the carriers participating therein, *without any action on the part of the Commission.* Such joint rates and through routes, initiated and established voluntarily by agreement between the participating carriers, are not through rates and joint routes prescribed or ordered by the Commission in connection with which it could use the broad powers conferred under paragraph 3 of Section 15, to prescribe the terms and conditions under which the through routes should be operated. The Commission's powers to prescribe terms and conditions as to such routes voluntarily established by freight carriers could not attach or would not be called into play. Therefore, provision by Congress was made under paragraph 8, which deals with the transportation of property delivered to a "railroad corporation

being a common carrier'' for shipment to any point of destination between which and the point of such delivery for shipment two or more through routes and through rates shall have been provided, to which through routes and through rates such carrier is a party.

In such cases, even though the joint rates and through routes had been established *voluntarily* by a carrier in accordance with the provisions of the Act and without any action by the Commission, the enactment of paragraph 8 gave the shipper the right to route.

It is further provided in paragraph 14 of Section 15 that—

> ''The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of any order under the provisions of this Act.''

This makes it clear that the specific powers conferred in paragraph 8 should not, and cannot be construed to cut down or limit the broader powers given in paragraph 3 of Section 15, or elsewhere in the Act.

The words ''railroad corporation being a common carrier'' now appearing in paragraph 8 of Section 15 appeared in the former Act which was in effect when the Commission decided the *Express Cases,* and evidently the Commission exercised the broad powers conferred by paragraph 3 of Section 15 when it prescribed, in the *Express Cases,* as one of the terms and conditions under which the joint rates and through routes established should be operated, the require-

ment that the shipper should have the right to designate the routing.

When the Commission prescribed shippers' routing as a part of its system of express rates under the broad powers to prescribe terms and conditions and wrote this requirement into the express classification governing all express rates, evidently it did not deal with the express companies as carriers by railroad falling within the terms of paragraph 8 of Section 15, since had it so regarded express companies the order as to shippers' routing would have been superfluous, as the right would have automatically attached under paragraph 8 of Section 15.

We do not find it necessary, therefore, to appeal to the provisions of paragraph 8 of Section 15 to uphold the power of the Commission to prescribe, as one of the terms and conditions under which its system of joint through rates and routes shall be operated, the requirement that the shipper shall have the right to designate the routing of express traffic. This is amply provided for under the provisions of paragraph 3 of Section 15.

In its original decision in this case, 78 I. C. C., at page 141, the Commission said, in overruling the contention of the American Company with respect to the lack of power in the Commission to require shippers' routing instructions to be obeyed:

> "The American contends that if a strict construction be given to the words 'carrier by railroad' in Section 15 (4) the phrase 'any railroad corporation being a common carrier' in Section

15 (8) also should be construed strictly, and that under such construction the shipper would not have the right to route express. The right of the shipper to designate routing *was a part of the system of express rates and practices prescribed by us in the cases herein referred to.* The express companies themselves provide in their express classification that the shipper has a right to route. Under Section 15 (3) we have not only the power to require through routes and joint rates, but also to prescribe the *'terms and conditions under which such through routes shall be operated'; and under this power we may provide for the right of the shipper to route. Certainly the establishment of alternative through routes would be of no advantage if the shipper has no right to direct that traffic shall move over such routes.''* (Italics ours.)

The contention that the power broadly conferred in paragraph 3 of Section 15 upon the Commission, not only to establish through routes but the terms and conditions under which they shall be operated, appeared in the Act of 1906, known as the Hepburn Act, which contained the provision that the power to establish joint routes might be exercised provided no reasonable or satisfactory through route existed, in no way militates against the construction for which we contend. The language of the Hepburn Act upon this point was as follows:

> ''The Commission may also, after hearing on complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this

> Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line" (34 Stat. L. 590, 4th Fed. Stat. Ann., 475).

It cannot be urged or contended that the language "and the terms and conditions under which such through routes shall be operated," as appearing in the Hepburn Act of 1906 just quoted, did not confer or vest power in the Commission to require a carrier to respect shippers' routing instructions over a joint through route and under joint through rates established by it in the exercise of the power conferred by said section. If the Commission found that an existing route, voluntarily established by the carriers, was not reasonable or satisfactory as a through route, and should order an additional route or routes established, then, clearly, it would have the power, under said Hepburn Act, to require shipper's routing instructions to be given effect over the additional route or routes which the Commission ordered and established. Otherwise the establishment of such additional route would not benefit the public or enable the shipper to avail himself thereof.

It may be true that under the power vested in it by that section to prescribe the terms and conditions under which the carriers should observe shippers' routing instructions, the Commission could not have made such a requirement with respect to routes which the carriers had, by agreement among themselves, voluntarily established and which were not created or

provided by affirmative action upon the part of the Commission; but, even so, that certainly would not militate against the power of the Commission to require shippers' routing to be observed in connection with routes *which the Commission itself ordered established.*

Nor can it be argued that because Congress later passed, in 1910, the provision now appearing as paragraph 8 of Section 15, expressly conferring on the shipper the power to route and used language which limited the provisions of said paragraph 8 to property delivered to "any railroad corporation being a common carrier," the necessary inference is that the Commission did not have power to require shipper's routing to be obeyed *in connection with routes ordered established by the Commission under powers conferred upon it by law.* It may be true that prior to the amendment of 1910 shippers were not given the right to route by any specific statutory enactment over routes voluntarily established by agreement between railroads and which routes had not been *ordered established by the Commission in the exercise of its powers to require through routes and joint rates.* In the freight service, as pointed out above, many through routes are voluntarily provided by railroads under specific freight rates established without any action on the part of the Commission. In such cases, since the Commission had not ordered or specifically prescribed such through routes and joint rates, it might well have been contended that the power contained in the Hepburn Act to prescribe the terms and conditions under which through routes and joint rates *ordered* and *required* by the Commission should be op-

erated, did not extend to through routes or joint rates *voluntarily* established by the railroads in the freight service. Therefore, Congress, in 1910, expressly conferred the power upon the shipper to designate routing "in all cases where at the time of delivery of the property to any *railroad corporation* being a common carrier," two or more through routes and joint rates had been previously provided and to which through routes the initial carrier was a party.

Since the Commission itself initiated and promulgated the uniform system of through express rates as a national system in the *Express Cases*, and since the Commission, in formulating, establishing and ordering said uniform system of rates, attached as one of the conditions under which the rates and through routes required should be operated, that shippers' routing instructions should be obeyed, it cannot be doubted that under the broad powers conferred by Section 15 as it stood in 1910, and the even broader powers now conferred, the Commission had ample power to require shippers' routing instructions to be respected as one of the "terms and conditions under which such through routes shall be operated."

In its original report in the *Express Case*, 24 I. C. C. 380, at page 405, the Commission condemned Rule 2 of the *old* Express Classification which provided "that the rates of the carriers are conditioned upon their right to route business as they may elect," and said that:

> "The application of this rule has been treated of elsewhere under the general heading of 'Circuitous Routing of Shipments' ",

The Commission condemned the same and required that it be removed from the classification (24 I. C. C. at page 405), and substituted in lieu thereof the specific requirement, appearing at page 393 of the original report, that:

> "The consignor shall have the right to designate in writing the joint through route thus established and published by which the specific shipment shall move, provided, however, that *in an emergency* the originating or any intermediate express company shall have the right, in the interest of expedition, to send the shipment by some other route than the one designated by the shipper, if delivery is not delayed by such action or the rate increased." (Italics ours.)

Rule 3 of the Express Classification prescribed by the Commission, and which appeared as Appendix "A" with the order entered on the second report, dated July 24, 1913, 28 I. C. C. 132, provided that "*shippers by designation in writing may route shipments by way of such established routes and transfer points as they may desire.*" See this rule quoted and commented upon in the Commission's original report in this case, 78 I. C. C., at pages 140, 141.

Rule 3, as pointed out by the Commission in its report in this case, is now in the express classification filed by the American with the Interstate Commerce Commission and is a part of its tariffs. Therefore, for the purposes of this case, even if the Commission did not have the power to provide for shippers' routing, the tariffs on file with the Commission make provision for shippers' routing and declare that the ship-

per shall have the right to route over established routes. The Commission has ordered certain defined routes to be established and made available. When that order is complied with as to the establishment of the through routes and when such through routes are provided in obedience to the order they are automatically subject to the right conferred by the classification on file, vesting in the shipper the privilege of selecting and designating any established route he may desire for the movement of his traffic.

It must be evident, therefore, that the Commission's order, requiring shippers' routing instructions to be obeyed in connection with the through routes it requires to be kept open under its system of express rates, is entirely valid in the light of Rule 3 appearing in the classification, even if the Commission did not originally have the power to require express carriers to publish such a rule, since as long as Rule 3 remains in the classification, it automatically attaches itself to all routes established or ordered.

It is perfectly manifest, however, that the Commission has ample power to provide for shippers' routing under the broad powers conferred by paragraph 3 of Section 15, and the Commission has so held in its report in this case.

Part IV.

PRELIMINARY STATEMENT.

Having Failed to Assign Cross-Error Appellees Cannot Rely in This Court Upon Any of the Grounds Urged by Them in the Lower Court in Support of Application for Injunction and Decided Adversely to Them.

Up to this point the discussion has been confined to the questions raised by the assignments of error. The majority opinion, as pointed out, based its decision solely on the ground that the Commission had exceeded its statutory power in that it had disregarded the limitation imposed by Paragraph 4 of Section 15 which the majority of the lower Court construed to apply to an express company, as well as to railroads.

As stated, all of the other grounds urged against the validity of the order and relied upon by appellees in the lower Court were expressly overruled and decided against appellees contentions by the entire Court, with the single exception of the shipper's right to route, which was not directly decided in the majority opinion, although it was upheld in the opinion of Circuit Judge Bryan.

The appellees have taken no cross-appeal, and are, therefore, we consider, cut off from urging in this Court that the grant of the injunction by the majority of the lower Court can be upheld and justified on any other ground than that on which it was specifically placed by the majority members of the Special Court. Particularly is this true as the opinion of the majority of the Special Court is referred to in the decree granting the interlocutory injunction, and is, in effect, made a part of such decree, with the result, according to our

view, that the decree really denies the injunction upon every ground urged by appellees except the two grounds, (a) the one upon which the injunction was granted, and (b) the shipper's right to route, which was not passed on by the majority.

See *Peoria & P. U. Railway Co.* v. *U. S. et al.*, 44 Sup. Ct. 194.

While we firmly insist that appellees are precluded from urging the grounds decided adversely to them by the Special Court, or any ground in support of said injunction other than the one upon which the same was placed by the majority of the Special Court, out of extreme caution we will undertake to demonstrate that all of the members of the Court were clearly right in the adverse holdings which they made against appellees.

The majority opinion sets forth five contentions or grounds as those urged by appellees for the relief sought, which grounds have heretofore been quoted. It only remains to consider under this heading, appellees' contentions numbered 1, 2 and 4, and these will be discussed in the order named.

(A) Contention That Order of Commission Attacked Is Arbitrary and Unreasonable Was Correctly Overruled and Decided Adversely to Appellees.

Appellees did not attack the order as being without evidence to support it. It is conclusively presumed that the findings made by the Commission as the basis for its order were amply sustained by the record before it, since there is no allegation in the bill which challenges the sufficiency of the evidence, and especially since the evidence which was before the Commis-

sion was not put in the record in this case by appellees.

The order attacked was made after full hearing, after the taking of voluminous oral and documentary evidence, and after full argument, oral and on brief before the Commission, and after complainant had again presented its case in the shape of a petition for rehearing and modification of the Commission's original report. Unless challenged on the ground that the report and order are not supported by substantial evidence, the findings, decision and order of the Commission are conclusive as to the discretion exercised and the facts found, and said order is not subject to judicial review unless it transcends or invades constitutional rights or is beyond the statutory power of the Commission.

Interstate Comm. Comm. v. *Illinois Cent. R. R.*, 215 U. S., 452;

Interstate Comm. Comm. v. *Union Pacific R. R.*, 222 U. S., 541, 547;

Proctor & Gamble Co. v. *U. S.*, 225 U. S., 282;

Interstate Comm. Comm. v. *D. L. & W. R. Co.*, 220 U. S., 235;

Los Angeles Switching Case, 234 U. S., 294, 311;

Houston & Texas Ry. v. *U. S.*, 234 U. S., 342, 359;

U. S. v. *Louisville & Nashville R. R. Co.*, 235 U. S., 314, 320;

Pennsylvania Co. v. *U. S.*, 236 U. S., 351;

Mfrs. Ry. Co. et al. v. *U. S.*, 246 U. S., 457, 482;

L. & N. R. R. Co. v. *U. S.*, 245 U. S., 463;

Seaboard Air Line Ry. v. *U. S. et al.*, 254 U. S., 57, 62;

Akron, C. & Y. Ry. et al., v. *U. S.*, 261 U. S., 184, 43 Sup. Ct. Rep., 270, 278;
Skinner & Eddy Corp. v. *U. S.*, 249 U. S., 557, 562;
U. S. v. *Illinois Central R. R. Co.*, Adv. Ops. Oct. Term, 1923. Nos. 6 and 7, Page 190, 68 L. Ed.

Appellees must proceed, therefore, on the theory that, conceding all the conclusions and findings of the Commission made in its original and supplemental reports to be true, its order is, nevertheless, so arbitrary and unreasonable as virtually to transcend its statutory authority, although it might not technically do so.

Interstate Comm. Comm. v. *Ill. Cent. R. R.*, 215 U. S., 452;
Interstate Comm. Comm. v. *Union Pac. R. R.*, 222 U. S., 541, 547;
Proctor & Gamble Co. v. *U. S.*, 225 U. S., 282.

The constitutional question will be discussed later, and the present consideration will be devoted to the claim that the order is arbitrary.

Appellees' entire contention in the lower Court with respect to the alleged arbitrary character of the order, and the alleged unreasonable acts which it was contended the order would require appellees to perform, centered in the proposition that if the American had provided a reasonably satisfactory route—either single line, entirely in its own service, or a joint route via the transfer point which afforded it its maximum haul—that company could not be required to establish through routes with the Southeastern. This is the understanding of appellees' contention in this regard, as stated in the majority opinion (R., 123), where the

grounds of attack upon the order by the American are enumerated and the first ground is stated to be—

> "(1) That under the order traffic originated by it (the American) in its exclusive territory north of Washington would be unnecessarily diverted from it at Washington to its competitor, thus depriving it, in many instances, of its long haul arbitrarily and unreasonably."

The contention that the existence of the American Company's single line or preferred joint routes constitutes a bar to any action by the Commission requiring the establishment of additional joint routes amounts to the assertion of a lack of power in the Commission to establish additional joint routes, if reasonable joint routes already exist, between exclusive offices of the American Company and exclusive offices of the Southeastern, or, if reasonable single line routes exist between offices of the American and common points.

The pertinent provisions of Sub-section (3) of Section 15, as it appears today in the amended Interstate Commerce Act and correspondingly as it appeared in the Act of June 18th, 1910, which was in effect when the *Express Cases* were decided, are reproduced below in parallel columns:

Sub-section 3 of Section 15 Amended Interstate Commerce Act, effective March 1, 1920.	Act to Regulate Commerce, Section 15, as Amended June 18th, 1910.
(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications,	The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the divi-

and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through rate where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line.

sion of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever, the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line.

It will be noted that in the present act after the words, "the Commission may," there has been added the following provision which did not appear in the former act:

> "And it shall whenever deemed by it to be necessary or desirable in the public interest"

establish through routes and joint rates, etc. In other words, while, in defining the duty to establish through routes and joint rates under the former act, and in part under the present act, it is provided that the Commission *may* establish such through routes and joint rates; under the *present act,* whenever it shall be deemed by the Commission to be necessary or desirable in the public interest to establish such through routes and joint rates, the requirement is mandatory.

Appellee, American Company, made before the Commission the same contention as it advanced in the lower Court, to the effect that the existence of reasonable single line routes or joint routes preferred by it constituted a bar to the establishment of addi-

tional routes. With respect to that contention the Commission said in its report in this case,—78 I. C. C., at page 130:

> "Aside from the construction placed upon paragraph (4) of Section 15, the American claims that under paragraph (4) of Section 1, if it provides through routes and reasonable facilities for their operation, it has fulfilled its common-carrier duty to the public, and that we cannot require it to establish additional joint through routes which would short-haul it.
>
> "Prior to 1910 our authority to establish through routes was limited by the following language:
>
> "*Provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.*
>
> "This limitation has now been removed, and we are required to establish through routes whenever deemed by us necessary or desirable in the public interest, and it is for us to determine on the basis of a proper record what express routes are reasonable and in the public interest." (Italics ours.)

Prior to the Hepburn Act of 1906 the Commission had no authority to establish joint through routes. The Hepburn Act, passed in 1906, conferred authority upon the Commission with respect to the establishment of joint routes but limited the power as follows:

> "Provided no reasonable or satisfactory through route exists, and this provision shall ap-

ply when one of the connecting carriers is a water line."

It will be seen from the amendment of 1910 (June 18th, 1910) hereinbefore quoted that this proviso or limitation upon the power of the Commission was omitted therefrom, so that after 1910 the existence of a reasonable route would not prevent the Commission from establishing additional joint routes where the carriers themselves neglected to provide such additional routes.

The Act of 1910 was very materially changed and the powers of the Commission enlarged by the amendment effective March 1, 1920, above quoted, whereby not only was power vested in the Commission to establish such through routes and joint rates, but it was mandatorily required so to do "whenever deemed by it to be necessary or desirable in the public interest."

If appellees' contention were sound, and if the existence of one through route limited the Commission's jurisdiction and power with respect to ordering additional through routes, it then could not establish such additional through routes, even though to do so were deemed by it to be necessary or desirable in the public interest. In other words, the contention with respect to the existence of one through route, single line or joint, constituting a bar to the establishment of additional routes, if sound, would restrict the Commission's power as it was restricted under the Hepburn Act, and all subsequent legislation and additional powers conferred by Congress upon the Commission would be

ignored, and the amending act of 1920 whereby Congress sought still further to enlarge and extend the powers of the Commission and to vest in it broader powers would be nugatory.

That the construction of the present statute contended for in the lower Court by appellees is erroneous is conclusively shown by the history of this legislation and by the recommendations made by the Commission to Congress following the decision of the Court in the case of *Interstate Commerce Commission* v. *Northern Pacific Railway Company,* 216 U. S. 538. That case arose and was decided *prior* to the amendment of June 18th, 1910, and under the Hepburn Act containing the proviso limiting the exercise of power to cases where no reasonable or satisfactory through route existed. It is historically true that after the decision by the lower court in the *Northern Pacific case,* and as a result thereof, the Commission in its Twenty-third Annual Report to Congress for 1909 recommended that authority be granted the Commission to establish additional through routes, even though a reasonably satisfactory one was already in existence. Congress, by the amendment of June 18th, 1910, struck out the proviso contained in the Hepburn Act and gave the Commission wide authority to establish any number of through routes under joint rates between two given points.

In its Twenty-fourth Annual Report to Congress for 1910 the Commission said, at page 19:

> "*Interstate Commerce Commission* v. *Northern Pacific Railway Company,* 216 U. S. 538. This

case was also referred to in our last annual report at page 36, where the facts are fully stated. The order of the Commission had established a through route and joint rate for passenger travel between points in the northwestern part of the State of Washington and eastern destinations via Portland, and this order had been attacked upon the ground that there was already in existence a reasonable and satisfactory through route. The circuit court sustained the contention of the defendants and enjoined the order, and this decree was affirmed by the Supreme Court of the United States.

"The Commission, in its last annual report, in referring to this case recommended that authority be granted to establish an additional through route even though a reasonable, satisfactory one was already in existence. Congress, by the amendments of June 18, 1910, struck out this provision as to the reasonableness of the route and gave the Commission authority to establish any number of through routes and joint rates between two given points. This difficulty is, therefore, done away with, but certain limitations are attached to the exercise of the authority as it now exists which have not yet been construed either by the Commission or by the courts."

Thereafter, by the Transportation Act of 1920, the powers of the Commission were still further enlarged so as to remove any restriction and vest in the Commission the widest discretion to determine whether additional through routes were necessary or desirable in the public interest and to make imperative the establishment of such additional routes by the Commission whenever it so found. The only limitation upon the power thereafter was that contained in Paragraph 4 of Section 15, which limitation by its terms and context was confined to railroads.

After the amendment of 1910, and prior to the amendment of 1920, the Commission repeatedly held that the existence of one through route constituted no bar whatever to the establishment of additional through routes. A few of the cases wherein this ruling was made are cited below:

Flour City S. S. Co. v. *L. V. R. R. Co.*, 24 I. C. C., 179, 185.
Wichita Falls System Joint Coal Rate Case, 25 I. C. C., 215.
Waverly Oil Works Company v. *Penna. R. R. Co.*, 28 I. C. C., 621, 629-30.
Truckers' Transfer Company v. *V. & W. C. Ry. Co.*, 27 I. C. C., 275, 277; and
Merchants & Mfr's Association v. *C. R. R. of N. J.*, 30 I. C. C., 388, 401.

In the *Express Cases*, 24 I. C. C., 380, and 28 I. C. C., 132, which were decided in 1912 and 1914, and consequently after the amendment of 1910, the Commission not only exercised the power conferred under the Act of 1910 to establish additional routes and joint rates, but prescribed a national system of uniform through rates under which all express carriers were treated as a unit and were required to combine their routes and service so as to make the rates uniformly applicable by all reasonable routes and to eliminate the former practice of making rates by combination on transfer points.

In the original report in the case in which the order attacked in this proceeding was made, after citing and quoting at length from its decisions and findings in the *Express Cases*, the Commission said, 78 I. C. C., at page 139:

"It was the purpose to treat all express companies as a unit forming one national express system, to have express move over direct routes and to make the same rate applicable thereto regardless of the route over which it moved. It was in the public interest for the express business to receive treatment similar to the mail service. Under the rates, rules and regulations prescribed in these opinions the express companies prospered."

The Commission then proceeds to outline what happened following the consolidation of express companies into the American Railway Express Company and also following the organization of the Southeastern and its entry into the field of express service, and, using the language hereinbefore quoted, said, at page 139:

"Upon the consolidation of the express companies, the same direct lines of traffic were used as when the many companies were in existence. However, when the Southeastern was created the American ceased to use certain direct routes over which it had handled express and substituted therefor other routes. The fact that the discontinued routes were used by the American, when it had access to all routes over all carriers, indicates that they were reasonable routes in and of themselves, although they may not have been the only reasonable routes over which express could have been handled. Because the American has worked out other reasonable routes is not a sufficient reason for permitting reasonable routes, in connection with the Southeastern, to be closed. The fundamental principles laid down in the *Express Cases* were prescribed at a time when there were 11 express companies. They should be followed now."

Adverting to the contention that the restoration of the system of rates prescribed by the Commission in the *Express Cases* and the reopening of the routes in effect prior to May 1, 1921, upon which date the Southeastern entered the field, would result in short-hauling the American Company, as contended by that Company, the Commission pointed out that this condition was inseparably connected with the system of rates which it prescribed in the *Express Cases* if said system was to be operated as a national uniform system of express rates whereunder the express companies would be treated as a unit. With particular reference to the claim that the uniform application of this system of through rates would result in short-hauling some of the express companies, parties to the different routes over which such rates applied, the Commission said further (78 I. C. C., at page 139):

> "The fact that we expected express companies to establish the most direct routes regardless of their long haul is shown by the following quotation taken from the first opinion, *supra*, page 411:
>
> " 'We have said to these carriers in connection with the discussion of the establishment of through routes and rates that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own line, and that divisions shall be agreed upon which shall compensate the originating carrier for its sacrifice.' "

It will be seen, therefore, that the Commission conceived that it had ample power, under the law as

amended by the amendment of June, 1910, to prescribe and make effective this national system of uniform through rates and direct through routes on the block and zone plan whereunder all express companies were treated as a unit and were required to combine their lines into joint through routes without regard to the long hauls of the separate companies. This exercise of power on the part of the Commission was not contested by the express companies.

The Commission in this case merely ordered that the restrictions placed by the American in its tariffs, which had the effect of breaking down the uniform application of the rates prescribed by the Commission, be removed, and that joint through routes under such uniform through rates (which routes were used preferentially by the American Company when it had the choice of all routes) be kept open in connection with the Southeastern under the uniform system of rates prescribed in the *Express Cases*. In taking this action the Commission does so under broader powers than it had originally when it established the system itself. There can, therefore, be no question as to the power of the Commission to establish the routes which its order requires, provided that, within its discretion, and after full hearing, it finds the same to be necessary or desirable in the public interest.

A full hearing has been accorded wherein voluminous evidence was taken and the Commission has specifically found and held that such additional through routes as it has ordered were both necessary and desirable in the public interest. It is submitted that its findings in this respect and its order are not subject

to judicial review unless made without substantial evidence to support the same, an issue which we do not understand is presented in the case.

Judge Bryan says in his separate opinion (R., 132):

> "I am unable to say that it is unjust or unreasonable to compel the American to deliver to the Southeastern express packages shipped from points north of Washington to points on the main line of the Southern Railway. The inequalities and discriminations which result from the present situation sufficiently appear from the reports of the Commission. The disadvantages which it is claimed by the American would result from a compliance with the Commission's order would be largely, if not completely, overcome by a proper division of rates."

It may not be inappropriate at this point to refer again to certain of the conclusions and findings made by the Commission in its original and supplemental reports, as well as those contained in its original decisions in the *Express Cases.*

By referring to the Commission's original report, the following facts appear which are pertinent in connection with its ultimate conclusions with respect to the desirability of, and the public necessity for, the additional routes ordered:

(1) A very considerable representation from the public intervened in the proceeding before the Commission, the names of the intervenors and the interests represented by them, respectively, being set forth in the original report, 78 I. C. C., 127. As stated in that report—

"All the interveners are of the opinion that it will be in the public interest that all direct routes be made available, that the shipper should have the right to route, and that through competition the public would obtain better express service."

Many of the intervenors offered evidence in the proceeding before the Commission in support of Southeastern Company's demand for additional routes.

(2) The Commission states that after the Southeastern was incorporated, and before commencing business on May 1st, 1921, that company filed a concurrence in all of the tariffs of the American, so as to make the rates and charges uniformly applicable over the Southeastern's routes and jointly between the Southeastern and the American; but the latter would not permit this, and by supplement effective May 1st, 1921, limited the concurrence of the Southeastern and made applicable joint rates and routes only from exclusive offices of one company to the exclusive offices of the other. Thereafter numerous complaints were received by the Commission from shippers and consignees with respect to routes, which had theretofore been used, having been closed on and after May 1st, 1921 (78 I. C. C., 128).

(3) It is stated, at page 128 of the original report:

"On and after May 1, 1921, the American ceased to operate over many routes that it had formerly used, and in lieu thereof routes its traffic over lines over which it operates. It attempted in all instances to procure either the entire haul or the longest possible haul, and in certain instances traffic was handled over circuitous routes."

(4) It is stated, at page 129 of the original report:

> "The record abounds in comparisons of express schedules from which it is argued by each company that the specific route used or desired to be used is practical and gives either equal or better service than the other route or routes in question."

The Commission then stated, however, that nothing could be gained by setting forth in its report all of these comparisons. At page 132 of the original report, after stating that the American contended that it is unreasonable to require the establishment of joint routes between common points and American exclusive points because to do so would violate the so-called "common to exclusive office rule," the Commission, in overruling such contention, said:

> "Express should be handled over reasonably direct routes. If traffic were delivered to the Southeastern at a common point, and if there were a direct joint route, then it would not be unreasonable for the Southeastern to participate in such traffic. Both companies would be on an equal footing if they competed for traffic destined to the other's exclusive offices. They should be allowed, however, to use only joint routes that are reasonably direct."

(5) At page 133 it is said:

> "Evidence was introduced respecting routes and schedules covering practically the entire territory. No attempt will be made to consider all of these schedules and routes. The examples hereafter shown are typical, and, although all deal with traffic moving through the border point of Washington, they represent the American's man-

ner of handling express through all other border points."

It will be borne in mind, in connection with the excerpt just quoted, that the order attacked in this proceeding merely requires the establishment of joint rates in connection with the Southeastern via Washington between exclusive offices of the American in the defined eastern territory north of Washington, on the one hand, and on the other, offices of the Southeastern (whether exclusive or at common points) located at points south of Washington on the main line of the Southern Railway through Atlanta to Birmingham.

It is next pointed out, at page 133 of the original report, that traffic originated by the American and transported over joint routes from American eastern points to exclusive Southeastern points in North Carolina and South Carolina is transferred to the Southeastern at Raleigh, Charlotte and Spartanburg; that if this traffic were transferred to it at Washington it would move over the Southeastern's direct route.

It is further said, at page 133:

> "The American claims that it is unreasonable in view of its present service to compel it to abandon any traffic to, or to share traffic with, the Southeastern. On the same theory, the Southeastern might decline to join in through routes to or from its exclusive points unless it were given the long haul."

At this point attention is again invited to the situation which will result if the Commission's order is com-

plied with in respect to traffic between the defined territories of origin and destination covered by the order. Between eastern points and offices of the Southeastern located at competitive points on the main line of the Southern Railway from Washington through Atlanta and Birmingham there will be through routes and rates over the single line of the Amercian between its exclusive offices and such common points; for example, between its exclusive offices in the East and such common points as Lynchburg, Charlotte, Spartanburg, Greenville, Atlanta and Birmingham. There will also be joint routes and through rates between exclusive American offices in the East and such common points in connection with the Southeastern through Washington; so that traffic may move either wholly over single line routes of the American Company, or, under shipper's routing, it may move in connection with the service of the Southeastern through Washington.

There will also be available between the *exclusive offices* of the two companies in the defined territories, two sets of joint through routes, the one being the joint through routes preferentially used by the American Company which afford to that company its maximum hauls and allow the Southeastern its minimum hauls; while the other set of joint routes, which would be preferentially used by the Southeastern upon traffic originated by it, would apply in connection with the Southeastern through Washington where the traffic, originated by the Southeastern at its exclusive offices or common points south of Washington, would be delivered to the American Company for transportation beyond, or, where traffic moving from an office of the

American Company north of Washington in the defined territory, when specifically routed by the shipper so as to require delivery to the Southeastern at Washington, would be transferred to the Southeastern at that gateway and transfer point. There would, therefore, be at least two available sets of routes, the one used preferentially by the American, and the other preferentially by the Southeastern, between American exclusive offices in the defined eastern territory and Southeastern exclusive offices and common points on the main line of the Southern Railway from Washington through Atlanta to Birmingham.

It requires no further argument or comment to show that this solution of the problem with which the Commission was confronted is not open to the charge that it requires the American to do an unreasonable act, or that power has been arbitrarily exercised. When the situation confronting the Commission—and which would have continued had the relief which it ordered not been granted—is borne in mind, it is at once apparent that to all of the main-line territory of the Southeastern between Washington through Atlanta to Birmingham there were available only routes through interior and remote transfer points creating uncertainty of schedule and tending to produce and producing delay. These difficulties and dangers of delay could be obviated by transfer to the Southeastern at the border transfer point of Washington, a protected transfer with ample facilities, where the traffic would be placed at once in the service of the Southeastern and moved to its offices in the South without further transfer, and the frequent passenger train schedules handling express over Southern Railway's

main line could thus be availed of and direct service secured.

Certainly a situation was presented to the Commission calling for the exercise of its judgment and discretion after an analysis of train schedules and connections, the advantages or disadvantages of the use of the protected transfer points at the border gateways, such as Washington, on the one hand, as compared with the interior and remote transfer points used by the American on the other, the frequency of the passenger train schedules to and from Washington over the main line of Southern Railway as compared with the infrequency of the schedules on branch lines through which latter the American via its preferred route sought to reach main line points on the Southern. The Commission having carefully and painstakingly analyzed the schedules, availability and sufficiency of the facilities at the border transfer point of Washington, as compared with those at the interior points; having investigated the actual performance of the American under its schedules and via its preferred routes, and having reached the conclusion that the additional routes which it ordered were imperatively necessary in the public interest, its findings will, it is submitted, be treated as conclusive and binding, and will not be judicially overturned.

(B) The Order of the Commission Does Not Unconstitutionally Invade the Property Rights of Appellees.

The allegation that the order violates the Fifth Amendment seems to be based upon the theory that it deprives the American Company of its property without due process of law in that, under shippers'

routing, it may be deprived of its maximum haul on traffic originated by it. In support of this contention, and to lend color thereto, the bill sets forth the number of offices which the American Company has in the defined eastern territory, the amount of its alleged investment, property, equipment, number of employes, etc., required, and the aggregate amount of payrolls, apparently for the purpose of strengthening its alleged claim to the long haul on traffic which it has originated by the use of such terminal facilities.

In considering this claim of alleged property right in its long haul, for the protection of which appellee seeks relief, it must be borne in mind, first, that by engaging in the express transportation business, it subjects its property to the exigencies of that business and must discharge the obligations and meet the requirements which inhere in the nature of such business; and, secondly, that appellee secures its so-called long haul by virtue of its uniform contract with the railroads over which it operates, which necessitates the pooling of freights and earnings, and the combination of rail lines by virtue of the pooling arrangement embodied in said contract, which arrangement in turn requires the specific and continuing approval of the Commission under the provisions of Section 5 of the Interstate Commerce Act. Without such approval, said pooling arrangement is prohibited by law, and there could be no such combination of railroads as appellee employs to construct its so-called long hauls.

As indicated in the proposition first above stated, in testing the claim of appellees' right to its long haul, it is imperative that the character of the use to which

appellee subjects its property when it sees fit to engage in express transportation be considered, since the character of the use and the exigencies of the service have a most important bearing upon the extent to which, in the interest of the public, regulatory bodies can subordinate the private will or the selfish interests of an express company to the public need and requirements. The extent to which regulation may lawfully go and the requirements which may be laid upon the express company to subserve the public needs and convenience are matters largely dependent upon and determined by the character and exigencies of the express transportation service. When an express company sees fit to enter upon this special or peculiar field of transportation and to employ its property in the express business, that property becomes subject to greater and more drastic requirements, in order to meet and respond to the needs of the public, than might be permitted or required in connection with another or different class of transportation. For example, the Interstate Commerce Commission has held in connection with the freight service where the transportation of dead freight by railroad was involved, that it was consonant with the public interest that routes via individual lines might be longer than via joint lines and at the same time carriers could not be compelled to enter into routes which would force them to forego their long hauls on dead freight; whereas, in connection with the transportation of live stock or perishables, the long haul routes would not be considered as adequate or responsive to the public needs or requirements. Likewise, long haul routes used in the freight service for the transportation of freight will not, in all cases, respond to the public needs or requirements in

the matter of passenger service. It, therefore, results that a route which is regarded as reasonably adequate for the handling of dead freight would not be so regarded for the transportation of passengers, or of perishable traffic, or of live stock.

The national system of express rates inaugurated by the Commission was prescribed, as the Commission has declared, to meet the public needs and the peculiar nature of the express business. The exigencies of that business, the character of the traffic handled, the expedition which the Commission stated was the very soul of the express business, the fact that this form of transportation was found by the Commission not to be analogous to the passenger or the freight service, but more properly comparable to that provided by parcels post or the mails, clearly indicates the distinctive and peculiar nature of the express business as compared with other forms of transportation. The Commission, likewise, in the *Express Cases*, said that the express companies were great forwarding agencies recognized by law for the conduct of a certain kind of transportation to which they had added a service that was *distinctive* and *peculiarly their own*, that the traffic which they moved should flow with the greatest possible celerity between all portions of the country and that:

> "whatever artificial barriers have been raised by the existence of separate express companies should be broken down and the rates made or practices followed should neither rest upon the foundation of a railroad's preference nor of an express company's opportunity" (24 I. C. C. 387-8).

This finding is again stated and quoted with approval in the report of the Commission in this case, 78 I. C. C. 138. It was further stated in the *Express Cases* that the Commission's sole concern in that investigation had been to discover in what regard the express companies were delinquent in rendering the service which they purported to give, or which should be given under reasonable, just, and nondiscriminatory rates, and to discover what remedy should be applied under the law to correct the evils and overcome the shortcomings in the service, thereby enabling the express carriers to discharge their public functions and to perform adequately the service which this class of transportation required. To do this, it was found necessary "to build from the very bottom by outlining a national system of stating rates" and to prescribe a uniform system of through rates under the block and zone plan, which rates were made to apply via all routes and under which system the same rate from point of origin to destination obtained "no matter by what route the shipment may travel and without reference to the number of carriers that may participate in the haul" (24 I. C. C. 391). At page 434 of the same report, after referring to the failure of the old system of express rates and the inequalities, discriminations and evils resulting therefrom, it is said:

> "For the correction of these evils there has appeared to be but one remedy, the construction of a rate system that should cover the United States."

After having stated that the test of the express company as a public utility was at hand and that it was not to be expected that even with an investigation as extended as that conducted in the *Express Cases,* all

causes of complaint would be removed, the Commission enumerated certain fundamental requirements as absolutely essential to be complied with by the express companies, and among others it was specifically required that the express companies adopt the new and simplified method of stating rates therein prescribed, and, further, that "the express carriers must unite in direct through routes, reaching all cities and towns accessible to each other by the shortest route measured in time" (24 I. C. C. 433). It was further found and held that certain customs and practices of the express carriers must be discontinued, and among others which were required to be eliminated was "the custom of the express carriers, when shipments have been intrusted to them for delivery at points not on the lines of railroad over which they operate, to retain possession of the shipment so as to receive the longest possible haul via their own lines" (24 I. C. C. 392). And again at page 431, in stating the standard of rates and certain conclusions reached with respect thereto, it was stated as the fourth conclusion:

> "That an express rate may not be based upon the monopoly right of the express company to be the exclusive freight forwarder over one or more lines of railroad" (24 I. C. C. 431).

Finally, in its second report in the *Express Cases,* wherein the Commission definitely ordered to be made effective the national system of rates under the block and zone plan which it had promulgated, it was said:

> "The block system of stating rates is admitted by the carriers to be practicable and satisfactory. By its simplicity and intelligibility

> it will afford the means for such a statement of express rates as will really publish them to shippers. The order herein will therefore prescribe such block system of stating rates as the reasonable practice to be followed by the respondent carriers on and after October 15th, 1913" (28 I. C. C. at page 137).

Again, in its second report (28 I. C. C. at page 139), in summing up the result of its investigation, the Commission said:

> "As a result of its investigation, the Commission was convinced that if unbearable discrimination and confusion was to be avoided, its order must take into account the entire body of rates for express service. In this respect the express service is radically different from the services performed by the railroads in the carriage of passengers and property and is more precisely comparable with the service performed for the public by the Post Office Department."

On account of the peculiar nature and characteristics of the express business, the quicker and more exacting service which carriers by express hold themselves out to perform, and the character of transportation which they undertake to afford, more far-reaching and exacting requirements may be imposed by regulatory bodies than would be the case in connection with the transportation of dead freight in the ordinary way by railroads.

In its final analysis, the extent of the power of public regulation and control over property subjected to public use is in direct ratio to the public need in the particular field of service. In the case of *Northern*

Pacific Railroad v. *North Dakota,* 236 U. S., 585, this Court in the opinion, on page 595, expresses this thought as follows:

> "The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, *the common carrier must discharge the obligations which inhere in the nature of its business.*" (Italics ours.)

This case is also interesting in distinguishing between regulations which require a carrier to perform obligations involved in its public duties and instances such as that dealt with in *Missouri Pacific Railway* v. *Nebraska,* 217 U. S., 196, in which it was sought to require a railroad to make expenditures solely for the private benefit of particular individuals and not for the benefit of the public as such (See 236 U. S., page 596).

In the case of the *Chicago & Northwestern Railway* v. *Ochs,* 249 U. S., 416, this Court, in the opinion on pages 420 and 421, enunciates the proposition for which we are contending, as follows:

> "As a common carrier a railroad assumes and must discharge the obligations which inhere in the nature of its business. Among these obligations is that of providing reasonable and adequate facilities for serving the public (*Northern Pacific Railway* v. *North Dakota* 236 U. S., 585-595). To do this requires an expenditure of money, of

course, but the expenditure is for property which will belong to the Company and be employed in its business. The money is not taken from the Company and given to others, nor is the use of the facilities to be uncompensated. Like other property employed by the Company in the transportation of persons or property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore, an enforced discharge of the duty to provide such a facility does not amount to a taking of property without compensation merely because it is attended with some expense."

In freight and passenger cases, the power of regulatory bodies to compel railroads to make physical connections, unite and combine their facilities, interchange traffic and establish through routes and joint rates, finds ample illustrations in the following decisions:

Wisconsin, Minnesota & Pacific Railroad v. *Jacobsen*, 179 U. S., 287. (Same case decided by Supreme Court of Minnesota and reported in 40 L. R. A. 389, 74 Northwestern, 893.)

Michigan Central Railroad v. *Michigan Railroad Commission*, 236, U. S., 615.

Grand Trunk Railway v. *Michigan Railroad Commission* 231, U. S., 457.

Pennsylvania Railroad v. *U. S.*, 236, U. S., 351.

Atlantic Coast Line Railroad Company v. *North Carolina Railroad Commission*, 206, U. S., 1.

State v. *Minneapolis & St. Louis Railroad et al.* (Supreme Court of Minnesota), 83 Northwestern 60.

See also *Atlantic Coast Line Ry. Co.* v. *Riverside Mills*, 219 U. S., 186.

Galveston, Harrisburg, Etc. Ry. v. *Wallace*, 223 U. S. 481.

Norfolk & Western Ry. Co. v. *Dixie Tobacco Co.*, 228 U. S., 593.

With respect to the claim made by appellee that it will be obliged to turn over a considerable portion of the traffic originated by it to the Southeastern, it is well to note the language of the Supreme Court of Minnesota in the *Jacobsen case, supra,* as follows:

> "Appellant cannot be allowed to obstruct the course of public traffic under the claim that by putting in this connection and letting such traffic take its course, appellant will lose a large amount of revenue which it would otherwise earn. If by reason of putting in the connection its revenue will be so reduced that it will not on its whole business receive a reasonable compensation for its services, its remedy is by a readjustment of the whole or such part of its schedule of rates and fares as under the circumstances ought to be readjusted in order to enable it to earn such reasonable compensation."

Also, in dealing with the contention that under the order the American Company will be required to employ its facilities for the benefit of the Southeastern, it may not be amiss to note certain language of this Court in the case of *Michigan Central Railroad Company* v. *Michigan Railroad Commission,* 236 U. S., 615, *supra.* On page 632, the Court would seem to dispose conclusively of such a contention by the following statement:

> "To speak of the order as requiring the cars of the plaintiff in error to be delivered to the Detroit United 'for the use of that Company' involves a fallacy. The order is designed for the

benefit of the public having occasion to employ the connecting lines in through transportation. The Detroit United, like the Michigan Central, acts in the matter as a public agency."

Again, in the same case, at page 631, this Court said:

"The insistence that the property of plaintiff in error in its cars is taken by the order requiring it to deliver them to the Detroit United Railway involves, as we think, a fundamental error, in that it overlooks the fact that the vehicles of transportation, like the railroad upon which they run, although acquired through the expenditure of private capital, are devoted to a public use, and thereby are subjected to the reasonable exercise of the power of the State to regulate that use, so far at least as intrastate commerce is concerned. *Munn* v. *Illinois*, 94 U. S. 113."

In the case of *Pennsylvania Railroad* vs. *U. S.*, 236, U. S. 351, an order of the Interstate Commerce Commission requiring the Pennsylvania Company to receive and transport over its terminals carload interstate freight from the Rochester Company having a physical connection with the lines of the Pennsylvania Company, was attacked upon the following grounds:

(a) That upon the facts shown there was no discrimination in a real sense, and certainly none which warranted the making of the order in question;

(b) That the order required the Pennsylvania Company to give up the use of its terminals to another Company in violation of the last clause of Section 3 of the Interstate Commerce Act; and

(c) That the order was taking of the railroad company's property, in violation of the protection afforded to it under the Constitution of the United States, forbidding the taking of property without due process of law, for the contention was that the effect of the order was to subject the Pennsylvania Company's property to the use of the Rochester Company without compensation.

It will thus be observed that the order attacked upon the grounds above briefly outlined required the Pennsylvania Company to switch traffic to and from its point of interchange with the Rochester Company to or from industries located upon the terminals of the Pennsylvania Company at Newcastle, a manufacturing city of much importance, situated near the iron, steel and ore industries of the Mahoning and Shenango Valleys in Pennsylvania.

With respect to contention (a) as above outlined, this Court held that whether there was undue or unreasonable preference or advantage was solely a question of fact with respect to which the finding of the Commission that there was unjust discrimination and undue preference was conclusive and could not be reviewed by the Court.

With respect to compensation to be provided for the services to be performed by the Pennsylvania Company, it was said, at pages 361-2, that:

"It is to be remembered that in the aspect which the case now presents, there is no question as to the terms which the Commission might prescribe, or the compensation which the Pennsylvania Company should receive for the services

to be rendered. The sole question is whether the Commission exceeded its authority in requiring the Pennsylvania Company to cease and desist from what the Commission found to be a discriminatory practice."

In over-ruling and declining to sustain contention (b) made by the Pennsylvania Company, this Court held that the order did not require the Pennsylvania Company to give the use of its terminals to another Company, in violation of the last clause of Section 3 of the Interstate Commerce Act, and, thus over-ruling one of the principal contentions of the Pennsylvania Company, held that under the principles announced in *Grand Trunk Railway* vs. *Michigan Railroad Commission, supra,* there was no taking of the terminals of the Pennsylvania Company for use by another road, within the inhibition of the restrictive clause then contained in Section 3 of the Act, but that the order merely required the Pennsylvania Company to receive and transport the cars from the Rochester Company in due course of transportation over the Pennsylvania Company's terminals at Newcastle, just as it transported, and with the same facilities with which it received and transported, cars from other connecting railroads.

With respect to contention (c), which raised the constitutional question and asserted that the order was a taking of the Pennsylvania's property, in violation of its constitutional rights, this Court squarely held that the Commission had the power to require the interchange of traffic between the two companies, and to compel the Pennsylvania Company to switch for the Rochester Company, as a part of the transpor-

tation service, subject to the regulatory powers of the Commission, and that the Commission likewise had the power to compel the Pennsylvania Company to discontinue the discriminatory practice whereby it declined to render for the Rochester Company, or in connection with traffic tendered by the Rochester Company, the same class of transportation or switching services which the Pennsylvania Company performed on traffic received from the Baltimore & Ohio. The Court, quoted with approval its prior decision in the *Detroit Case,* (*Grand Trunk Railway* vs. *Michigan Railroad Commission, supra*), at page 371, as follows:

> "In the case at bar a shipper is contesting for the right, as a part of transportation. The order of the Commission was a recognition of the right, and legally so. Considering the theatre of the movements, the facilities for them are no more terminal or switching facilities than the depots, side tracks and main lines are terminal facilities in a less densely populated district. A precise distinction between facilities can neither be expressed nor enforced. Transportation is the business of railroads, and when that business may be regulated and to what extent regulated may depend upon circumstances."

The case of *Michigan Central Railroad* vs. *Michigan Railroad Commission, supra,* clearly recognizes the principles announced in the *Jacobsen* case and in the case of *Grand Trunk Railway* v. *Michigan Railroad Commission, supra,* and in the opinion on page 631, this Court also enunciates the doctrine that the duties of a carrier do not stop at what they were at common law. The Court says:

> "At common law a carrier was not bound to carry except on its own line and probably not required to permit its equipment to be hauled off the line by other carriers * * * * * * but in this as in other respects, the common law is subject to change by legislation and so long as the reasonable bounds of regulation in the public interest are not thereby transcended the carrier's property cannot be deemed to be 'taken' in the Constitutional sense."

The several cases just cited bear upon the extent to which legislation may go in requiring railroads in the freight service to make connections, switch for one another, join in through routes and unite their lines in the public interest.

Here we are dealing with a character of service which the Commission has stated was most nearly akin to that afforded by the Post Office Department, where the traffic must move with much more celerity and flexibility than could be required in the transportation of freight by railroads. Again, it must be considered that an entirely different rate structure was found necessary to be created for the express business from that which is employed in the freight service, or even in the passenger service, the underlying principle of which system of express rates, promulgated by the Commission, being that the express companies were to be treated as a unit and compelled to merge their lines, totally disregarding separate entities.

But appellee, American Company, is not left uncompensated for the surrender of its long hauls, when it turns shipments over to the Southeastern Express

Company in joint handling at the Washington transfer point under shippers routing:

First: Because the value of its properties are a factor in the fixation of its rates and

Second: It can be fully compensated for any sacrifices which it may make through the adjustment of divisions under the ample power vested in the Commission to fix and control the same.

In the original *Express Cases* the Commission expressly stated that any sacrifice which the express carriers might make in surrendering their long hauls through combining their routes under the uniform system of through rates therein prescribed could and would be compensated and provision would be made for such compensation in the adjustment of divisions. The Commission clearly gave that assurance in the original *Express Cases* and repeated it in the original report in this case, 78 I. C. C. at page 139, and expressly recognized the principle in its supplemental report, 81 I. C. C. 250, when it said:

> "We can require a carrier to perform only a reasonable act. The question of divisions over joint routes still remains for determination."

The Commission would not have made this reference to divisions unless it had it in mind to deal equitably with appellee in the matter of divisions in connection with the joint routes which its order requires to be opened. It certainly must be presumed that the Commission will deal fairly and justly with both express companies in this regard, and two conclusions must inevitably be drawn:

First: That the use of appellee's property in connection with the routes established by the Commission's order constitutes a use in the interest of the public and in the discharge of public obligations.

Second: That appellee can be adequately compensated in the matter of foregoing its long hauls.

Its legitimate interests are thus fully protected in the matter of divisions and it cannot be successfully contended that the order of the Commission takes its property without due process of law.

In this connection, it may not be inappropriate to note that after the decision of the lower Court in the case of the *Northern Pacific Railway* vs. *I. C. C. supra,* in making the recommendation contained in its 23rd Annual Report to Congress that additional powers be conferred upon the Commission with respect to the establishment of through routes and joint rates, the Commission said at page 38:

> "The legitimate interest of carriers can always be protected in the division of the rate. If a railroad is required to establish a through route and joint rate which give it the short haul upon business as to which it would otherwise obtain the long haul, this may properly be recognized in determining its share of the joint rate; but the first consideration is the public convenience, and the mere selfish interest of carriers should not be allowed to over-ride that. Neither the Hill lines nor the Harriman lines should be permitted to dictate the route by which trans-continental travel shall move against the reasonable desire of the passengers."

In its final analysis, there can be no property right of an express company to its so-called long hauls. There may be an equity which should be considered in fixing divisions where, owing to the exigencies of the service and in the public interest, under the system of rates employed in express transportation the originating carrier is compelled to forego its long haul and surrender the traffic at a junction which does not yield its maximum haul, but there is and can be no absolute property right to such maximum haul. To illustrate: Rates are published and apply between New York and Washington over the lines of the American Company. Rates apply between Washington and Atlanta over the lines of the Southeastern Express Company. Section 6 of the Interstate Commerce Act recognizes separately established local or proportional rates, as well as joint through rates. In the absence of joint through rates, one carrier establishes separately its rates to a point of interchange with another and the connecting carrier establishes separately its rates from such point of interchange. Such separately established rates can be combined and used in the absence of joint through rates. It is true that the sum of the separately established rates may be, and usually is, higher than the joint through rate, but even where the combination of separately established rates is higher, a shipper can nevertheless bill a shipment from New York or any other eastern point to Washington in care of the Southeastern at Washington and compel the American Company to transport such shipment from point of origin to Washington and there deliver it to the consignee in care of the Southeastern for further transportation by the latter in its service. In such cases, the American Company would collect its local

rate from point of origin to Washington, and the Southeastern would collect, for its haul south of Washington to destination, its local or proportional rate, dependent upon whether the Southeastern had a proportional rate published from Washington to destination, which proportional, when added to the local of the American up to Washington, would equalize this combination with the through rate applicable over the single line of the American Company from origin to destination. It will be seen, therefore, that, under shippers routing, any shipper could compel the American Company to turn over the traffic to the Southeastern at Washington by paying the full rate to Washington. The *terms* (*i. e.*, the amount of the charge) upon which the shipper could secure this service do not affect the *power* of the shipper to require the service. After all, therefore, the question is not one of absolute right to the long haul, but concerns the compensation which the originating line should receive for its surrender of traffic at the border transfer point, rather than being permitted to handle it in its own service to destination, or to an interchange point nearest destination.

To sustain the contention of appellee, based upon its alleged claim to constitutional rights in its so-called long haul, and to hold that the Commission was without power to compel an express company to forego its long haul in any case where it had a single line route or a joint route more advantageous to it, which in point of time of delivery to consignee was approximately the same as that which could be secured via other joint routes, would be to destroy absolutely the underlying principles and the very foundation of the

system of express rates inaugurated by the Commission and which has been in effect since 1914.

The Special Court was unanimous in overruling the American Company's contention with respect to the invasion of its alleged property rights in its long hauls, and its claim that the order deprived it of its property contrary to the Fifth Amendment to the Constitution of the United States. In the majority opinion it is said (R., 123):

> "Nor do we think the order infringes the constitutional guarantees to liberty and property in giving the shipper an election which may deprive the American Railway Express Company of its long haul. If otherwise valid, it is only a part of the system of regulation and rate making to which public service companies consent or at least subject themselves when they enter the business. Such regulation when done in the public interest and not arbitrarily is not unconstitutional. Besides it must be assumed that full justice will be done when the rate comes to be divided."

(C) The Fact That the Commission Did Not Prescribe the Divisions of the Joint Rates Ordered, but Withheld That Subject for Future Consideration, Does Not Invalidate the Order.

Appellee, American Company, contended in the lower Court that the Commission's order should be enjoined because it was thereby required to participate in the joint routes ordered to be established before the divisions of revenue had either been agreed upon by the two companies or fixed by the Commission; or, in other words, that the use of the routes would begin before the basis of divisions between the two express companies was settled.

As set up in the answer filed by the Southeastern, appellee is effectually estopped by its agreement and stipulation of record, to the effect that the decision upon the question of divisions should be postponed until the other questions were decided in this case, from now complaining that the divisions were not fixed contemporaneously with the opening of the routes. But besides, when tested solely upon its strict legal merits, this contention of appellee cannot stand.

In disposing of the same, it was said, in the majority opinion of the lower Court (R., 127):

> "The objection to the order that it puts a route into operation without having first fixed the division of the rate is unsustainable. The record shows a waiver of the matter. Furthermore, the prefixation is not required by the Interstate Commerce Act; Railway Co. v. United States, — U. S., —, decided February 19, 1923." (Akron, C. & Y. Ry., et al. v. U. S., New England Division Case, 261 U. S., 184, 43 Sup. Ct. Rep. 270.) "And lastly the division can often be more justly made after some trial of the new route."

Circuit Judge Bryan thus disposes of this contention, in his separate opinion (R., 133):

> "The fact that the Commission did not prescribe the division of rates, but withheld that subject for further consideration, does not invalidate the order. The Commission deferred that matter until the question of its right to establish routes had been determined. This it had the right to do." (Citing the New England Division Case.)

In the case of *Atlantic Coast Line R. R.* v. *Riverside Mills*, 219 U. S., 186, the contention was made that a

railroad which, as an initial carrier under the Carmack Amendment became responsible to the shipper from origin to destination, thus being susceptible of being required to answer for the defaults of its connections, was deprived of its property rights and liberty because it was required in this way to enter into a form of partnership with a railroad which might not be eventually responsible. This Court, in its opinion, pages 203-206, in an illuminating way demonstrates that because the right of recoupment belonging to the initial carrier against its connections may not always be effective, the regulation would not in consequence be invalidated.

The District Court of Massachusetts, in the case of *New York Central R. R.* v. *U. S.*, (Interchangeable Mileage Book Case), decision by three Judges, 288 Fed., 951, on page 954, said:

> "The amendment itself is attacked as unconstitutional, in that in requiring the interchangeable scrip coupons it compels an interchange of credit between the railroads and thereby compels a service at the risk of complete financial loss in case of the insolvency of the road from which the scrip may have been purchased. In our judgment, the decisions of the Supreme Court upholding the Carmack Amendment (Atlantic Coast Line R. R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7), the right of a Legislature to compel the interchange of cars (Michigan Central R. R. Co. v. Michigan R. R. Commission, 236 U. S. 615, 35 Sup. Ct. 422, 59 L. Ed. 750), and of Congress to compel the establishment of joint rates (St. Louis Southwestern Ry. Co. v. U. S., 245 U. S. 136, 38 Sup. Ct. 49, 62 L. Ed. 199) necessarily involves the de-

> termination of the right to compel an interchange of credits as between the roads despite the possible loss from such an insolvency."

In the New England Divisions Case, *A. C. & Y. Ry. et al.* v. *U. S., supra,* this Court deals with this very question in a way which, as shown above, was conclusive to the minds of all of the Judges composing the Special Court hearing the instant case. The question involved here was concisely stated in a similar situation dealt with in the New England Divisions case, as follows:

> "It is asserted that the order directs the transfer of revenues of the Western carriers to the New England carriers pending a decision in the matter of divisions."

The Court then proceeds to outline the proceedings had in the particular case, and after doing so says, on page 277:

> "A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently, and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision, than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution."

It is submitted that the decision last cited is conclusive of the question here.

CONCLUSION.

It is respectfully submitted that the grant of the interlocutory injunction was based entirely upon the construction given to Paragraph 4 of Section 15 of the Interstate Commerce Act by the majority of the Court; and that the action of the Special Court is rested solely upon a naked question of law. Indeed, it is apparent from the opinion controlling the order that but for the view which the majority entertained as to the meaning of Paragraph 4 of Section 15, the Court would have denied the injunction and upheld the order of the Commission, since the view of the majority coincided with the view of the dissenting Judge on all of the questions decided except the narrow legal question growing out of the construction of Paragraph 4 of Section 15.

It is, therefore, indisputable that this particular interlocutory injunction was not granted in the exercise of a discretion which courts of equity sometimes avail of to preserve the *status quo* where questions of fact, and perhaps questions of law, have not been maturely developed and considered, and where the cause is not ripe for mature decision settling the law of the case. Here the Court first granted a temporary restraining order on September 19, 1923, (R., 121) subsequent to the hearing on September 12, 1923, for the reason, as recited in such temporary restraining order, that the Court was not at that time "sufficiently advised to render a decision" upon the motion for an interlocutory injunction. In the decree and order of

October 11, 1923, the statement is made in substance to the effect that the Court at that time "*being advised,*" did, in accordance with the majority opinion of the Court, grant the interlocutory injunction. It is, therefore, apparent, first, that the interlocutory injunction was granted solely upon a question of law, and, second, that the grant was the result of a decision reached after mature consideration, after full hearing, argument and deliberation by the Judges, and that such grant was based upon a deliberate decision made solely upon a question of law.

The separate opinions filed by the majority and by the dissenting Judge show mature consideration of all contentions presented, and decide (with the single exception heretofore noted) every question raised.

The decision is clean-cut on the questions of law, and no cross-appeal having been taken by appellees questioning the correctness of the decision of the Special Court where adverse to them, it remains for this Court to determine only whether the errors assigned by appellants, or any of such assignments of a controlling nature, are well taken.

It is respectfully submitted that the decree of the lower Court granting the interlocutory injunction should be reversed and such injunction set aside, and the order of the Commission allowed to become effective.

Respectfully submitted,

SANDERS MCDANIEL,
CHARLES J. RIXEY,
Attorneys for Appellant,
Southeastern Express Company.

Washington, D. C.,
March 5, 1924.

In the Supreme Court of the United States

Office Supreme Court
FILED
APR 5 19
WM. R. STANS
CL

October Term 1923.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION *Appellants* vs. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees*	No. 666
SOUTHEASTERN EXPRESS COMPANY *Appellant* vs. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees*	No. 667
SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and SOUTHERN FISHERIES ASSOCIATION *Appellants* vs. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees*	No. 668

BRIEF FOR APPELLEE, AMERICAN RAILWAY EXPRESS COMPANY

H. S. MARX,
T. M. CUNNINGHAM, JR.,
ROBERT C. ALSTON,
Attorneys for American Railway Express Company.

Page

PART II

Summary of the Decisions of the Commission in Express Cases, 24 I. C. C. and 28 I. C. C..... 16

The American Company is a "Carrier by Railroad" Within the Meaning of Section 15 (4) of the Act 22

Sections 1, paragraphs 1 and 3 of Act Require that the American Company be Held to be a "Carrier by Railroad" Within the Meaning of Section 15 (4) 24

If an Express Company is not a Carrier by Railroad, It is Not Subject to the Act..... 25

Wells-Fargo & Co. vs. Taylor, 254 U. S., 175, Discussion of 31

The Context in Connection with Which the Expression "Carrier by Railroad" was Used in Section 15 (4) 35

Use of the Expression "Carrier by Railroad" in Section 6 of the Act 37, 39

Dictionary of the Act Controls 39

The Decision of the Commission in Express Rates, etc., 24 I. C. C. Shows that it Then Regarded Express Companies as "Carriers by Railroad" Within the Meaning of Section 15 (4)..42, 43

Some of the Authority Which the Commission Surrenders if it Holds that the Term "Carrier by road" does not Include Express Companies.. 43

Page

It is Fundamental in the American Law of Common Carriers that the Originating Carrier should not be Unnecessarily Short-hauled.... 44

The Power of the Originating Carrier to Retain Traffic for the Long Haul Is a Property Right 50

The Commission has Approved the Organization of American Company and Its Contract..... 51

Development of the Law as to the Establishment of Through Routes and the Shipper's Right to Route 52

American Railway Express Company vs. Railroad Commission of Georgia, 274 Federal, 649, Discussion of 58

Who Are to be Considered in Determining Whether the Order of the Commission is Reasonable.. 61

Existence of a Satisfactory Through Route, Effect of 63

Competition 64

The Right of A Shipper to Route Express Shipments 61

The Meaning of That Part of Paragraph 3 of Section 15 of the Act Which Empowers the Commission to Establish Divisions of Through Rates and the Terms and Conditions Under which Through Routes shall be Operated.... 72

The Order Complained of is Unconstitutional.... 75

Section 3 of the Act is Not Involved..... 77

Page

The Pooling Provisions of the Act are Not Involved 79

Effect of Rule 3 of the Express Classification.... 80

APPENDIX

The Development of the Statutory Power of the Commission to Establish Through Routes.... 1

Hepburn Act of June 29, 1906..... 1

Act of June 18, 1910..... 2

Act of February 28, 1920..... 4

TABLE OF CASES

	Page
Act of June 18, 1910, Sec. 15 (E)	53
Act to Regulate Commerce, Sec. 1 (1)	24
1 (3)	24
1 (3)	30
3	77
5 (7)	4
5 (1), (2), (7)	14
5 (7)	31
6 (1)	37
15 (a)	31
15 (3)	36, 37
15 (3)	72
15 (3 and 4)	37
15 (4)	10, 11
15 (4)	14
15 (4)	22
15 (4)	34
15 (4)	35
15 (4)	38
15 (4)	39
15 (4)	47
15 (6)	41
15 (8)	67
15 (8)	74
Act of February 28, 1920, Sec. 15 (3 and 4)	55
Act of June 18, 1910, Sec. 15 (D), (E)	53
American Ry. Express Co. v. Railroad Commission of Georgia, 274 Fed., 649	58
A. T. & S. F. Ry. vs. D. & N. O. R. R. Co., 110 U. S., 667, 680	52
A. T. & S. F. Ry. vs. U. S., 232 U. S., 199	49 and 75
23rd Annual Report of Commission (1909) p. 7	61
"	68
"	69

Page

C. B. & Q. R. R. Co. vs. Wisconsin, 237 U. S., 220.. 76

Cin. & Col. T. Co. vs. B. & O. W. S. R. R. Co., 20 I. C. C. C., 486..... 46

Clark on Interstate Commerce, 30-31 (Published by John Byrne & Co.)..... 58

Columbia Gold Mining Co. vs. Oregon-Washington R. R. & Navigating Co., 35 I. C. C., 42, 43.... 46

Commercial Club of Superior, Wisc. vs. Great Northern Ry. Co., 24 I. C. C., 96, 113..... 45

Congressional Record, Vol. 45, p. 3476..... 67

Congressional Record, Vol. 45, p. 3466..... 68

Congressional Record, Vol. 45, p. 2819..... 70

Consolidation of Express Companies, 59 I. C. C., 464 64

Cothran & Connally vs. U. S., 276 Fed., 48..... 28

Cultra vs. Western Union Telegraph Co., 44 I. C. C., 670 39

Dakota Junctions, 81 I. C. C., 275..... 48

Express Case, 1 I. C. C., 349..... 35

Express Cases, 24 I. C. C., 381 and 28 I. C. C., 137. 16

Express Contract, 59 I. C. C., 518..... 79

In Re Express Companies, 1 I. C. R., 677..... 59

Express Rates, Practices, Accounts and Revenues, 28 I. C. C., 580 23

Federal Employers' Liability Act 32

Federal Employers' Liability Act 33

Federal Employers' Liability Act 34

249 Federal, 109 34

Genert vs. Limbach, 50 Sou., 903, 904..... 35

Page

Gulf, Colorado & Santa Fe R. R. Co., vs. Miami Steamship Co., 86 Fed., 419 56

Great Northern R. R., vs. Merchants Elevator Co., 259 U. S., 285, 291 78

Great Northern Ry. Co. vs. Minnesota, 238 U. S., 340, 346 75

Hepburn Act of June 29, 1906 35

1 I. C. C., 677, 682 40

24 I. C. C., 381, 387, 390, 418, 419 42

24 I. C. C., 387, 419 48

24 I. C. C., 387 36

24 I. C. C., 389, 424, 426 60

24 I. C. C., 392 17

24 I. C. C., 393 17

24 I. C. C., 411 50

24 I. C. C., 411-413 ..... 20, 21

24 I. C. C., 414 16

24 I. C. C., 431 43

28 I. C. C., 136 82

28 I. C. C., 136, 137 18

28 I. C. C., 139 27

28 I. C. C., 580 23

45 I. C. C., 227 47

59 I. C. C., 459 4

59 I. C. C., 459, 469 80

59 I. C. C., 518 74

I. C. C. vs. B. & O. R. R., 43 Fed., 37, 56 52

Page

I. C. C., vs. Chicago Great Western R. R., 209 U. S., 109, 119 52

I. C. C., vs. D. L. & W. R. R., 216 U. S., 531..... 53

I. C. C., vs. D. L. & W. R. R., 216 U. S. 531, 537, 538. 45, 51

I. C. C., vs. Nor. Pac. Ry., 216 U. S., 544..... 60

Investigation of Alleged Unreasonable Rates and Practices on Meat, 23 I. C. C., 656, 662..... 47

Kentucky & Indiana Bridge Co. vs. L. & N. Ry. Co., 37 Fed., 567, 633 51

Keogh vs. C. & N. W. Ry., 260 U. S., 156, 164.... 78

Little Rock & Memphis R. R. Co. vs. E. T. V. & G. R. R. Co., 47 Fed., 771, 776, 778, 782..... 65

Lewis' Sutherland Statutory Construction, Vol. II, Sec. 344, 345, 346 .....63, 64

McCarthy vs. State, 175 N. W., 785..... 28

Missouri & Illinois Coal Co. vs. Ill. Central R. R., 22 I. C. C., 39, 48..... 71

Morgantown & Kingwood Divisions, 49 I. C. C., 540, 549 75

Nashville Grain Exchange Co. vs. U. S., 191 Fed., 37 59

Oklahoma Portland Cement Co. vs. A. L. & G. R. R., Co., 32 I. C., 225..... 72

Pennsylvania Co. vs. U. S., 236 U. S., 351..... 78

Rule 3 of Express Classification 80

Simms Oil Co. vs. Houston & Texas Cen. R. R., Co., 85 I. C. C., 537, 538-9..... 49

Salt Rates from Wisconsin to Iowa, 27 I. C. C., 526, 529 45

Sou. Pac. Co. vs. I. C. C., 200 U. S., 536, 554..... 52

Page

State of Washington vs. Fairchild, 224 U. S., 510.. 51

State of Washington vs. Fairchild, 224 U. S., 510.. 60

State of Washington vs. Fairchild, 224 U. S., 510.. 75

Sec. 15D, 24 Stat. L., 384 as amended by 34 Stat. L. 589; 36 Stat. L. 552 34 Stat. 539..... 53

34 Stat., 584 25

38 Stat. at Large, 219..... 13

Suffern Grain Co. vs. I. C. R. R., 27 I. C. C., 192.. 45

Tex. & Pac. Ry. vs. Abilene Cotton Oil Co., 204 U. S., 426, 444 78

Through Passenger Routes, 16 I. C. C., 309, 311..45, 50

Transit on Lumber and Forest Products in Carloads in Washington, Idaho and Montana, 83 I. C. C., 451, 458..... 48

Transportation Act of 1920, Sec. 407..... 4

U. S. vs. Ill. C. R. R. Co., 44 S. C. R., 189, 192....52, 65

Village of Hubbard vs. U. S., 278 Fed., 754, 755.... 24

Waverly Oil Works vs. Pa. R. R. Co., 28 I. C. C., 621, 630 .....47, 65

Wells-Fargo & Co., vs. Taylor, 254 U. S., 175, 187..31, 32

Western Mines, 66 I. C. C., 108..... 48

APPENDIX

34 Stat. L. 589, 590..... 1

4 Fed. Stat. Ann. 2nd Ed., 475..... 1

24 Stat. L. 384 as amended by 34 Stat. L. 589, 36 Stat. L. 552, 553.....2, 3, 4

	Page
4 Fed. Stat. Ann. 2nd. Ed., 469, 471	4
36 Stat. L. 552-553	4
I. C. Act. of Feb. 28, 1920, Sec. 15 (3)	4
15 (4)	5
15 (6)	6
15 (8)	7

In the Supreme Court of the United States

October Term 1923.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION *Appellants* *vs.* AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees*	No. 666
SOUTHEASTERN EXPRESS COMPANY *Appellant* *vs.* AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees.*	No. 667
SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and SOUTHERN FISHERIES ASSOCIATION *Appellants* *vs.* AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees*	No. 668

BRIEF FOR AMERICAN RAILWAY EXPRESS COMPANY

By stipulation, the record in each of these cases is the same except as to formal parts. The subject matter of the controversy in each case is the same. Each is an appeal from the same order or judgment. The only record which is complete within itself is that in which the Southeastern Express Company is the Appellant (No. 667). The references to the pages of the record are from the record in that case.

PART I.

STATEMENT OF THE CASE

Questions Involved

May the Interstate Commerce Commission lawfully require an express company which operates in interstate commerce by railroad, to establish and maintain through routes with a competing express carrier so as to permit shippers to require the originating carrier to be short-hauled, notwithstanding that it has a reasonable route from origin to destination or from origin to a point much nearer destination than that proposed by such through route?

The question in turn divides itself into two, to-wit:

(1) *Is the American Railway Express Company a "carrier by railroad" within the meaning of Section 15 (4) of the Act to Regulate Commerce?*

(2) *Is the order of the Commission reasonable and just which requires the American Railway Ex-*

press Company to shorthaul itself on traffic originated by it and as to which it has reasonable and adequate through lines and is rendering reasonable service from point of origin to destination, or from point of origin to transfer point much nearer destination than that fixed by the order?

Appellants must substantially assert that the Interstate Commerce Commission has "unlimited power" (R. 132) in requiring express companies to establish through routes.

Another way of stating the proposition is: An express company is entitled to the long haul on interstate shipments originated by it, so far as that can be preserved to it without causing unreasonable delay in delivery thereof to the consignees.

The case involves no controversy over rates. The rates will be the same regardless of the route over which the traffic moves. No controversy over markets is involved. There is no purpose to prefer or to shut off any market for any product, or to discriminate against any such market. No question of fact is involved. The case is based upon the facts as found by the Commission, the contention being that these facts do not justify the order of the Commission.

Organization of American Company

American Railway Express Company operated over substantially all the rail lines in the United States until May 1st, 1921, when for reasons satisfactory to the Southern Railway Company, it was excluded from the lines of the Southern Railway System. The American Company now operates over substantially all the rail lines

in the United States, except those hereinafter described, over which the Southeastern Company operates. The organization of the American Company was approved by the Interstate Commerce Commission (59 I. C. C. 459) upon the authority conferred upon it by Paragraph 7 of Section 5 of the Interstate Commerce Act as amended by Section 407 of the Transportation Act of 1920.

Organization of Southeastern Company

Southeastern Express Company began business May 1st, 1921. It was formed principally by men who were either connected with or interested in the Southern Railway System (R. 19). Southeastern Company operates over the lines of the Southern Railway System, Mobile & Ohio Railroad, and Tennessee Central Railroad, which lines lie principally in the territory south of the Ohio and Potomac Rivers and east of the Mississippi River; and it also operates over an electric line which runs from Washington to Baltimore and over a short line from Baltimore to York, Penn. These lines altogether comprise about 10,000 miles.

Order of Commission

Upon the consolidated complaints of Southeastern Express Company and Southern Fisheries Association against American Railway Express Company (in which the Appellants, Southern Traffic League and Atlanta Freight Bureau, intervened) the Interstate Commerce Commission (Commissioner Hall dissenting) passed an order July 9th, 1923, whereby American Company and Southeastern Company were ordered to establish and maintain

> "through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island

and Connecticut, New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Company from Washington to and including Birmingham, Alabama, on the other, with transfer between the American Railway Express Company and the Southeastern Express Company at Washington, D. C. * * * * * * and, that the tariffs shall provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed." (R. 43).

Effect of the Commission's Order

The American originates all the railroad express traffic in the New England States, in the City of New York, and on the direct routes from New York to Washington, and operates from Washington to Birmingham via Atlanta over the lines of the Richmond, Fredericksburg & Potomac Railroad and the Seaboard Air Line Railway, and operates over other lines leading down into the territory south of Washington.

The order of the Commission puts it in the power of shippers and of the Southeastern Express Company (through solicitation of shippers or consignees who may control the routing) to divert at Washington from the lines of the American Company to the lines of the Southeastern Company, traffic moving through Washington between the territories described in the Commission's order, although the American Company has a reasonably direct through route to destination, or without unreasonable delay or circuity of routing can deliver the traffic to the Southeastern at a junction point beyond Washington. This is what is commonly designated as "short-hauling" a carrier. For illustration, a shipment from New York to Atlanta whether it moves all the way

over the American's lines or whether it is transferred to the Southeastern at Washington, reaches Atlanta in about the same time. The distance from New York to Atlanta is about eight hundred and sixty-three (863) miles. If this shipment is transferred at Washington, the American is deprived of about 650 miles of the haul. Many similar illustrations could be made. It has been suggested that the American could be compensated for the loss of the haul in the division of the rate. But this is not practical, and moreover it is vague and uncertain as no divisions of the rates have yet been prescribed. If the American has the right to the haul, this right cannot be taken away from it and compensation be made in the form of a division of the rate.

The American has made large investments in the territory in which this traffic originates and has to bear all the expenses of collecting it, and has established adequate facilities to handle the traffic (See R. p. 6-9). The Commission found (R.23):

> "The American operates each day to and through Southeastern territory over 235 car routes for which 313 cars are used daily. No car lines operated wholly within this territory or from the border points of Washington, Louisville, Evansville and Jacksonville, to points within the territory are here included. For its use 16 special express trains are operated daily, all of which handle express destined to Southeastern territory and also 16 special trains in the reverse direction are operated from this territory to American exclusive points."

The Commission has not found that any of the routes operated by the American in the territory embraced within its order are unreasonable or circuitous. The Commission found specifically (R.19):

"On and after May 1st, 1921, the American ceased to operate over many routes that it had formerly used and in lieu thereof routes its traffic over lines over which it operates. It attempted in all instances to procure either the entire haul or the longest possible haul, and in certain instances traffic was handled over circuitous routes. Numerous complaints were received by us with respect to express shipments, and as the result of conferences between express offices and our representatives, 60 additional joint routes were established effective August 1st, 1921. Certain other joint routes in connection with express handled over the Tennessee Central Railroad were established February 9th or March 15th, 1922. This became necessary because the American ceased operations over that road on February 1st, 1922, and the Southeastern thereafter performed the express service thereon. As a result of these joint routes the express now moves between these particular points over the most direct lines. The record abounds in comparison of express schedules from which it is argued by each company that the specific route used or desired to be used is practical, and gives equal or better service than the other route or routes in question. Nothing can be gained by setting forth all these comparisons."

Contention of the American Company

The American does not contend that it has the right to hold traffic on its own lines, if thereby the delivery of the traffic is unreasonably delayed, or if its route is unreasonably circuitous; but it does contend that it has the right as to the traffic which it originates, to carry it on its own lines as long as it may do so without unreasonably delaying the delivery of the traffic at destination. Wherever it has been demonstrated that substantially better service can be afforded to the public by a joint route with the Southeastern or by delivery to the Southeastern at Washington, the American holds itself ready to establish such joint routes and to make such

delivery at Washington. The American in its bill seeking to enjoin the order of the Commission averred (R. 4):

> "Your orator is ready and willing from time to time to join in such additional through routes as may be necessary to provide delivery of the traffic to consignee without unreasonable delay."

In the conference between the American Company and the Southeastern Company, which followed the first report of the Commission and which was suggested by the Commission, the American specifically states its attitude as follows: (R. 37)

> "The American has established a large number of through joint routes with the Southeastern Express Company. It believes that the routes which have been established now give to the public, not only a reasonable express service, but in many respects, the best express service the public has ever known in the territory involved. It is, however, willing to establish additional joint routes, if any are necessary, in order to obviate unreasonable delay in the delivery to consignees. • • • •
>
> "In the establishment of any such joint routes, the originating carrier shall have the right to the long haul, so far as that can be preserved to it without causing unreasonable delay in the delivery of the traffic to the consignee. The shipper shall have the right to designate in writing upon the shipment which of the established joint routes shall be used." (R. 37).

The Southeastern rejected this proposition.

This proposition and its rejection, draw the issue in this case about as specifically as it can be drawn.

Basis of the Commission's Order

The order of the Commission is predicated upon the finding that it is necessary and desirable in the public

interest, that two routes should be established via Washington, one via the American, and the other via the Southeastern; although the American which originates the traffic may have a reasonably direct through route. We quote from the opinion of the Commission (R. 32):

> "We are of the opinion and find that it is necessary and desirable in the public interest, that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Comany and points on the lines of the Southeastern Express Company, regardless of the fact that one Company may have a reasonable direct single-line route or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Company, and the other via the transfer point selected by the American Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings."

The finding of the Commission "that it is necessary and desirable in the public interest" that the Southeastern Express Company should be permitted to short-haul the American Company at Washington, is based upon the theory as stated in several portions of the Commission's opinion that competition will be thereby promoted between the two Express Companies, and that competition is desirable in the public interest (R. 18, 29, 30, 32).

When the Commission properly finds that it is necessary or desirable in the public interest that a route be established, the effect of the finding is to set in motion the power which has been granted to it to establish through routes. That power is to be exercised within those limitations which control the Commission in establishing such routes. One of those limitations is the prohibition contained in paragraph 15 (4) against short-hauling the originating carrier, and of course there is always the further limitation that the Commission's order should be just and reasonable under the circumstances.

The right of the shippers to route is very much more important to the Southeastern (which the Southeastern Company can avail itself of through solicitation of the shippers or consignees), than to the shippers themselves. The Commission in its opinion (R. 31, 32) finds:

> "In the vast majority of cases, shippers do not route their express. The record shows that because of the various schedules and routes the average layman is not capable of picking out the most direct route. The President of the Southern Fisheries Association testified that in his opinion about 95% of the men in the fish business could not do it. But this fact should not prevent a shipper who is capable and who desires to, from routing express over reasonably direct routes."

The Bill of Complaint

The American Company brought its bill of complaint against the United States of America (R. 1), in the United States District Court for the Northern District of Georgia to enjoin the enforcement of the order of the Commission. The contentions of the bill are that the order of the Commission is unlawful and unconstitutional: (R. 13)

First, because under Paragraph 4 of Section 15 of the Interstate Commerce Act the Commission is prohibited from requiring any *carrier by railroad* without its consent to embrace in a joint through route substantially less than the entire length of its line, unless thereby its route would be unreasonably long as compared with another practicable through route which could otherwise be established; and the American Company is a carrier by railroad within the meaning of the Act.

Second, that the order of the Commission was unreasonable and unjust:

(*a*) In that it completely ignored the rights of the American Company.

(*b*) In that the order put it in the power of the Southeastern Company by solicitation of shippers to short-haul the American Company.

(*c*) In that the order permitted shippers to route shipments without regard to the lawful rights of the American Company.

(*d*) In that the finding that the order was necessary and desirable in the public interest was based solely on the erroneous theory that as competition was desirable from the standpoint of the public the Commission therefore had the power to create competition between the two companies, although thereby one was deprived of the traffic to which it was justly entitled and which it naturally controlled.

(*e*) In that the interest of the shippers was remote and negligible and that the order was in reality not in the public interest at all, but was in the interest of the Southeastern Express Company at the sacrifice of the interest of the American Company.

Third, That the order of the Commission was contrary to the Fifth Amendment of the Constitution of the United States, in that it deprived the American of its liberty and its property without due process of law.

Intervention of the Seaboard Air Line Railway

Seaboard Air Line Railway Company intervened (R. 46) in the cause and was made a party plaintiff. Seaboard Air Line Railway Company pointed out in its intervention that it had a contract with American Railway Express Company to carry express matter over its railroad and that the Southeastern was the express agency of its competitor, Southern Railway Company; that the effect of the order of the Commission would be to divert to the line of the Southern Railway at Washington express traffic originating in the New England States and in New York City, and upon the direct routes of the American Railway Express Company between New York and Washington, which would otherwise move over the Seaboard Air Line Railway in conjunction with the Richmond, Fredericksburg & Potomac Railway; that the order would deprive the Seaboard Air Line Railway of a considerable express revenue; that the route of the American over the Seaboard Air Line Railway and its connections was a reasonable, direct route, and that the Seaboard Air Line Railway had expended considerable money in providing the equipment and facilities for carrying this traffic; and that the order of the Commission was illegal and unconstitutional for the reasons set out in the bill of the American Company.

Answer of the Interstate Commerce Commission

The Interstate Commerce Commission intervened and answered the bill (R. 92-94). This pleading is substan-

tially nothing more than a general demurrer to the bill. It asserts the right of the Commission to make the orders which it did make.

Answer of the United States

The United States entered its appearance and adopted the answer of the Interstate Commerce Commission (R. 94-95).

Intervention of the Southeastern Express Company, et al

Southeastern Express Company (R. 101), Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association (R. 95) all intervened and were made parties defendant in the cause.

The pleadings of each of said intervenors, while somewhat argumentative and illustrative, amount to nothing more than a general demurrer to the bill.

Interlocutory Injunction

The case was heard on application for an interlocutory injunction before three judges—Hon. Nathan P. Bryan, Circuit Judge, and Hon. Robert T. Ervin and Hon. Samuel H. Sibley, District Judges—under the provisions of the Urgent Deficiency Appropriation Act, October 22nd, 1913 (38 Stat. at Large 219).

October 11th, 1923, the District Court issued its interlocutory injunction and

> "adjudged that the execution and enforcement of the order of the Interstate Commerce Commission set forth in the petition be and the same is hereby enjoined pending the further hearing of this case and until the further order of the Court; without prejudice, nevertheless, to the right of the Interstate Commerce Commission to make further in-

quiry and to establish such through routes in the territory involved, as shall be within the exceptions and provisos of Paragraph 4 of Section 15 of the Interstate Commerce Act, and not in conflict with the prohibitions of said paragraph of said section as set forth in the opinion and judgment of this Court." (R. 122).

This is the order from which the Appellants have taken their several appeals.

Judge Sibley rendered an opinion in the case (R. 122) in which Judge Ervin concurred, in which they held that an Express Company was a "carrier by railroad" within the meaning of the provisions of Section 15 (4) of the Act, and that the order of the Commission transgressed the prohibition there contained. Circuit Judge Bryan dissented (R. 128) and held that an Express Company was not a "carrier by railroad" and was not included within Section 15, paragraph 4 of the Act; that the order was not unjust and unreasonable; that the Uniform Express Contract between the American and the Railroads over which it operates provides for a pooling of freights and a division of earnings which is prohibited by paragraph 1, Section 5 of the Act, except by permission of the Commission under paragraph 2, Section 5 of the Act, and from this Judge Bryan concluded that "in establishing through routes for Express Companies and in dealing generally with them, the Interstate Commerce Commission has practically unlimited power, including that to require routings by shippers to be complied with; provided always its acts are just and reasonable and not arbitrary." (R. 132).

As we have pointed out above, the organization of the American Company has been approved by the Commission under the provisions of Paragraph 7, Section

5 of the Act. There is nothing in the opinion of the Commission in this case to indicate that the Commission disapproves the contract and the question is not even mentioned in the Commission's opinion.

On December 7, 1920, the Commission approved the grouping and division of earnings as provided for in the contract between the American Railway Express Company and the railroads (59 I. C. C. 518).

PART II.

BRIEF OF THE LAW

A Summary of the Decisions of the Commission in the Express Cases, 24 I. C. C., 381, and 28 I. C. C., 137.

These decisions make, to quite an extent, the background of this proceeding and it is well to have some analysis of them before proceeding to a more definite discussion of the issues.

The purpose of these decisions and of the orders flowing therefrom, was to establish a system which would simplify the method of ascertaining and stating rates and which would prevent circuity in transportation of express matters. It was not intended to provide a system for short-hauling any express company. Quite to the contrary, the Commission undertook to extend to express companies all the protection which the law gave to railroad companies in this respect.

These decisions were rendered respectively June 8, 1912 and July 24, 1913. Their effect, so far as they concern the present matter, may be summed up as follows:

The country was divided into zones, blocks and sub-blocks for the purpose of ascertaining and stating express rates. The zones were used in fixing only the amount of the rate, not the principles of the system. The blocks were made by the intersections of parallels of latitude and the meridians of longitude. They were numbered in a systematic way beginning at the Northwestern part of the country. There were eight hundred and thirty (830) of them (24 I. C. C. 414). The rates on long haul traffic were from block to block. A point

in each block was selected as typical. The rates from all points in the block of origin to all points in the block of destination were the same. The rates on short-haul traffic were made on the same principle, but the sub-blocks controlled. Sub-blocks were simply divisions of the main blocks. The rates from the point of origin to destination, or from one block to another, or from one sub-block to another, were the same, regardless of the route over which the traffic moved. To make an extraordinary illustration, the rate was the same on a shipment of the same kind moving from New York to Atlanta, which came by the most direct route, as on that which moved by a route so indirect as from New York to San Francisco, San Francisco to New Orleans and New Orleans to Atlanta.

This system, without more, would have destroyed itself, because it would have permitted the most indirect or circuitous of routing with the consequent delay in the handling of traffic. The Commission recognized, and undertook to cure this, making it the subject of the third division of its decision (24 I. C. C., 392), saying:

> "For the cure of this most annoying, and one of the most frequent, causes of complaint against the express companies, they should be required forthwith to establish and jointly publish through routes between the principal points in the United States, which routes shall follow the main lines of travel, the most direct in point of time measured by the schedule of those passenger trains by which normal schedules are observed. These joint through routes should be known and designated by number and should be filed with the Interstate Commerce Commission."

The Commission then gives an Illustration of how the routes should be formed and numbered (24 I. C. C. 393).

The Companies undertook to comply with this direction, but finding it burdensome, reported to the Commission to that effect (28 I. C. C., 136). On November 30, 1912, the Commission issued an order establishing a Committee to be known as "the Direct Routing Committee." The Committee was composed of a representative of each express company and of the Commission. The Commission expressed the expectation that this would minimize the evil of indirect routing (28 I. C. C., 137).

The subject is dealt with again by the Commission in the case at bar (R. 30) as follows:

> "The quoted extracts from the express case show the effort to curb circuitous routing by express companies. We first prescribed that direct routes be established. It developed that it would be too much of a burden upon the express companies to file and publish these routes in the technical tariff sense. Thereupon the express companies were relieved from so doing, but it was provided that a direct routing committee be appointed, including our representative. The duty of this committee was to study the question of routing by express companies and to provide direct routes in instances where it was found that express companies were indulging in unreasonably circuitous routing. The express companies were expected voluntarily thereafter to use the routes suggested; if not, we, after investigation, were to order what routes should be used.
>
> "The direct routing committee made no formal report, but it handled informally from day to day the questions of misrouting. No complaints against the express companies for indirect routing were made subject to the decisions in 28 I. C. C. 131.
>
> "*The tariffs showed that all routes were open, but the express companies' practice of using direct routes eliminated and closed just as effectively as if by tariff publication, all indirect or circuitous routes. If a shipment acci-*

dentally moved by a circuitous route, the rate was the same, but the shipment was improperly handled." (Italics ours).

"The Southeastern contends that since no routes were specified in the tariff all routes were open or 'established'. The American maintains that the routes decided upon by the express companies which were regularly used by them, became 'established' routes, just as if they had been specifically filed and published in a tariff and that a route was an 'established route' if it was the route used by the particular express company in question."

This contention on the part of the Southeastern Express Company brought about circuitous routing, and the Commission so holds (R. 31). When the Southeastern came into existence and offered its general concurrence, it was contending that the fact that rates were applicable over all possible routes "established" every such route. It refused to give effect to the fact that a Direct Routing Committee had been established and stood for a system which left no check upon circuitous routing, either by shipper or carrier. The American Company's limited concurrence had the effect of putting the system back to what the Commission had intended it to be, as nearly as was practicable in the circumstances.

Rule 3 of the classification, which gave the shippers the right to route by "established" routes, did not give, and was never intended to give, the shipper the right to route over all possible routes, and the Commission so holds.

The duty to establish routes, with the consequent right of the shippers to select between such established routes was left with the express companies in the manner stated, with no intent to cause any company to unnecessarily short-haul itself. The general application of the

rates permitted "in an emergency" the originating or any intermediate express company to send the shipment by some other route, but if the shipment moved out of the established route, the shipment was improperly handled, unless in case of emergency.

> "There is no more reason for a shipper to be allowed to route circuitously than there is for an express company." (R. 31).

The system which the Southeastern Express Company undertook to set up did give the shipper the opportunity for circuitous routing, and that this was used by the shipper, is shown by the Commission's decision (R. 31).

In 1912, there were no through express rates. Through shipments moved upon a combination of local rates (24 I. C. C. 411 and 413).

In establishing through routes with through rates, the Commission's decisions are to be taken with this background. There is nothing in these decisions to indicate that it was intended that the originating express carrier should be unnecessarily short-hauled. The object in establishing through routes and through rates was to prevent circuity of routing and delays incident thereto, and to make certain the applicable rate, and to make the ascertainment thereof less difficult. The Commission would not have appointed the representatives of the Express Companies on the Committee for the establishment of routes, if it was intended that the originating express company should be unnecessarily short-hauled.

So strongly did it feel on this subject, it directed that in the establishment of through routes, arrangements should be made for division of earnings, and

"that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own lines, and that divisions shall be agreed upon which shall compensate the originating carrier for its sacrifice. Some such arrangement is essential to the proper working of a scheme of direct through routes which will effecively stop the delays consequent upon the practice of indirect routing." (24 I. C. C. 411).

The object there was to prevent circuitous routing, and to require the originating express company to surrender its right to "the longest haul possible via its own lines," when that haul was "unreasonably long as compared with another practicable through route which could otherwise be established."

In 1921, when the Southeastern Express Company came into the field, the American Company was the only express company operating by railroad. The Southeastern having proposed a plan by its universal and unlimited concurrence with the aforementioned arrangement, which completely did away with all checks upon circuitous routing, and it having refused to recognize the existence of, or to re-establish, the Direct Routing Committee, it became necessary for the American Company to establish routes, which it did in its limited concurrence. It established through routes between only the exclusive offices of the two companies. It subsequently established additional through routes which materially short-hauled itself, in its effort to avoid unreasonable delay in the handling of traffic. (R. 19).

The American Company is ready to establish any other through routes wherever necessary, in order to

obviate unreasonable delay in delivery of traffic to the consignees, and it does not insist upon the long haul on traffic originated by it, where this will cause such unreasonable delay. It does insist upon the long haul on traffic originated by it where this can be retained without causing unreasonable delay in the delivery of the shipments.

The Commission's order in the case at bar does not depend upon its ascertainment that the American Company is violating this statement of principle, but upon the theory that this principle is wrong.

The American Railway Express Company is a "Carrier by Railroad" Within The Meaning of Section 15 (4) of The Act To Regulate Commerce

Section 15 (4) of the Act to Regulate Commerce, is here reproduced:

> "In establishing any such through route, the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice,

hearing or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

That part of the original report of the Commission dealing specifically with this subject, begins at page 20 of the record. The Commission held that:

> "It is our conclusion that the provisions of paragraph 4 of section 15 do not apply to express companies, and it is unnecessary to discuss cases cited in which the courts and this Commission have applied the law in dealing with routes established and connections required to be made between 'carriers by railroad' ".

Thus the Commission sets off express companies into a class all to themselves, just as though the Act did not apply to them unless they were specifically so named. It will develop that this would render the Act wholly inoperative as to express companies.

The question is one to be determined by the "dictionary of the Act," (R. 126) as was observed by the majority opinion of the District Court.

Express companies are well defined in the opinion of the Commission in "Express Rates, Practices, Accounts and Revenues," 28 I. C. C., 580. The apposite part of this opinion is set out in the opinion of the Commission in the present case where the Commission says:

> "We must, therefore, regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own." (R. 27).

Express companies are not by name made subject to the Act to Regulate Commerce. They became subject to the Act through the definition of the term "common carrier" which was used in the Hepburn Act (June 29, 1906). Prior to that time, express companies not owned by railroads were not subject to the Act. All common carriers are not now subject to the Act.

> "The Interstate Commerce Act does not by its terms, confer jurisdiction on the Interstate Commerce Commission over all interstate carriers or all interstate commerce or traffic."
>
> Village of Hubbard, vs. United States,
> 278 Fed., 754-755.

Section 1, paragraph 1 of the Act, contains the following:

> "The provisions of this Act shall apply to common carriers engaged in:
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement for a continuous carriage or shipment."

No other part of the Act is appropriate to extend the jurisdiction of the Commission over express companies. Paragraph 3 of Section 1, which was added to the Act by the Hepburn Act (June 29, 1906), contains the following:

> "The term 'common carrier' as used in this Act shall include all pipe-line companies; telegraph, telephone and cable companies operating by wire or wireless; *express companies;* sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the

word 'carrier' is used in this Act it shall be held to mean 'common carrier' ".

These two paragraphs of the Act define the carriers which are subject to the Act.

If an Express Company is not a carrier by railroad it is not subject to the Act; if it is a carrier by airship, by water, by truck or by any other instrumentality it is not subject to the Act.

The term "carrier by railroad" by the "Dictionary of the Act," aptly includes not only a company which owns and operates a railroad, but any carrier which uses the instrumentality of a railroad to perform the carriage.

The word "by" naturally imports the means or method of performing the carriage. The use of the word "by" certainly does not require the construction that the carrier must, itself, operate the railroad which is used. The point is that the carriage is performed by that instrumentality, and it makes no difference whether the carrier operates the railroad itself or by contract procures someone else to operate the railroad for it. Regardless of who operates the railroad, when express matter is being transported over a railroad, the Express Company which makes the contracts with the shippers to carry their traffic over a railroad is a carrier by railroad, and the term aptly and technically defines the business in which the Express Company is engaged.

The phrase "carrier by railroad" does not occur in the original Interstate Commerce Act or in any of the amendments thereof until it is used in one place only in the Act of June 29th, 1906 (34 Stat. 584). The Act of June 29th, 1906 introduces for the first time transportation by pipe line, sleeping car companies and ex-

press companies. The only place in which the term "carrier by railroad" is used in the Act of June 29th, 1906 is in Section 2 amending Section 6 of the original Act to distinguish a carrier by railroad from a carrier by pipe line and a carrier by water. The Act of June 18th, 1910 (36 Stat. 539) added telegraph, telephone and cable companies (whether wire or wireless) to the carriers which were subject to the Act. Thereafter, the expression "carrier by railroad" is frequently used in the amendments and particularly in the amendment of February 28th, 1920, which made several changes in the phraseology of the Act. The original Act almost invariably employed the term "carriers subject to the Act." The amendments subsequent to the amendment of June 29th, 1906 frequently used the term "carriers by railroad" to differentiate carrier by railroad from the other kind of carriers covered by the Act. Where it was intended to include all carriers of property except those by pipe-line, by water or by telegraph, telephone or cable, then the words "carrier by railroad" were used The word "carrier" could not be used because every instrumentality covered by the Act was specifically included by the Act within the word "carrier" and for the same reason the words "common carriers subject to the Act" could not be used where it was intended to include carriers by railroad and exclude other kinds of carriers.

The amendment of February 28th, 1920, inserted the word "any" in the first line of Section 15 (4) so that it now reads:

> "(4) In establishing any such through route the Commission shall not," etc.

The amendment of February 28th, 1920 changed the words "any company" in Section 15 (4) to "any carrier by railroad" and inserted the parenthesis which now appears in this paragraph. The insertion of the word "any" before the words "such through route" emphasizes the comprehensiveness of the limitation. The words "any company" were eliminated so as to prevent the construction which the appellants now put upon the paragraph, namely, that the paragraph applies only to a railroad company which owns or operates a railroad. With the words "any carrier by railroad," which were substituted by the Act of 1920, there is no room left for the construction that Section 15 (4) was dealing only with the owner or operator of a line of railroad. The words "carrier by railroad" were also used because the parenthesis which immediately precedes makes an exception "where one of the carriers is a water line." The words in Section 15 (4) "the entire length of its railroad or any intermediate railroad operated in conjunction and under a common management or control therewith" are appropriately used when referring to an express company which is operating over or uses a railroad, and there is nothing in this particular phrase which limits the section to a railroad company which owns or operates the railroad.

No reason has been advanced why carriers of express by railroad should not be included in Section 15 (4) of the Act. The Commission in its decision in 28 I. C. C. R. 139 in speaking of express rates stated "In this respect the express service is radically different from the services performed by the railroads in the carriage of passengers and property, and is more precisely comparable with the service performed for the public by the Post

Office Department." This language is repeated in the opinion of the Commission in this case (R. 29). Considering the vast numbers of shipments by express, the infinite number of routes by which it may be carried and the fact that the routes are effected by frequent changes in passenger train schedules the reasons for prohibiting the short-hauling of express companies are even weightier than the reasons which apply to railroad companies. It would certainly derange the business of the Post Office Department if its patrons had the right to route without regard to the interest of the Post Office Department, that is of the public generally. That the express company is more like the Post Office Department than it is like a railroad in the great multiplicity of shipments it handles is the very reason why, like the Post Office Department, it should have control of the routing.

If an express company is not a carrier by railroad, it is not subject to the Act.

If the Express Company is not a carrier by railroad, the Commission's jurisdiction over it does not exist.

The phrase "carrier by railroad" is thus used in the first section of the Act to include an express company which operates over a railroad. It is so defined by legislative enactment. It must continue to have that meaning throughout the Act until the context shows that it is clearly intended by Congress that it should have another.

> "Where a statute defines the meaning of a word, it is improper to seek to give it a different meaning."
>
> Cothran & Connally v. United States,
> 276 Fed. Rep. 48.
> McCarthy vs. State,
> 175 N. W., 785.

The petition of the Southeastern Express Company before the Interstate Commerce Commission pleaded that:

> "The American Railway Express Company • • • • • • • • *is also a common carrier express company,* engaged in the transportation of property by express *wholly by railroad and partly by railroad and partly by water,* between points in the United States."

The petition took this position because it was essential that it be taken in order that the Interstate Commerce Commission should have jurisdiction over the subject matter. It was a recognition that *if the American Company is not a carrier by railroad, the Commission has no jurisdiction over the controversy involved in this case.*

The definition of the term "common carrier" and of the word "carrier" was put into the Act on the 29th day of June, 1906. The Act itself was adopted on February 4, 1887. During the nineteen years intervening between the enactment of the original Act and the Hepburn Bill, express companies not owned by railroads, were not subject to the Act. The definitions above referred to were adopted *in order that the provisions of the Act which had been applicable only to railroad companies (in so far as carriers by railroad were concerned) should be by that fact made applicable to express companies.*

The majority opinion in this case states the matter in this language:

> "In the case of the Interstate Commerce Act, Congress, by an amendment of June 29, 1906, brought pipe line carriers under the Act, by the simple declaration that 'the provisions of this Act shall apply' to them. But to bring express and sleeping car companies within it, it proceeded

to *define the term* 'carrier' otherwise than it had been construed by the Commission. The enactment was that the term 'Common carrier as used in this Act shall *include* express companies and sleeping car companies.' This was a legislative reversal of previous construction, whether by Commission, Courts or public. Effect must be given to it by making the term include those companies whenever used in the Act and its amendments. By so doing, the words of the first section must read 'common carriers including express companies and sleeping car companies engaged in the transportation of passengers or property wholly by railroad, etc.' Thereby *such* expresss companies as carry property by *railroad,* and *such* sleeping car companies as carry passengers *by railroad,* and only such, are made subject to the Act." (Italics from the opinion). (R. 124-125).

Congress did not stop in 1906, when the Hepburn Act was adopted, and make a new code for the regulation of express companies distinct from that for railroad companies, but by the change of the meaning of the words "common carrier" it placed express companies under the Act, which up to that time, had been applicable only to railroad companies (and certain water carriers) and it thereby made the provisions of the Act and its amendment, which were applicable to railroad companies, applicable to express companies, except where the context clearly made another meaning.

Prior to the Act of June 29, 1906, the term "express companies" did not appear in the Act at all. After the enactment of the Hepburn Act, the term appeared in the Act once, and that in paragraph 3 of Section 1.

Express companies are mentioned in the Act to Regulate Commerce as it now stands in only the following instances: to-wit: (1) Section 1, paragraph 3, where the term "common carrier" is defined to include ex-

press companies; (2) Section 5 (7) which empowers the Commission to authorize a consolidation of the four express companies into the American Railway Express Company; (3) Section 15 (a) which provides for the recapture of earnings of certain carriers, defines the term "carrier" to mean a carrier wholly by railroad, or partly by railroad and partly by water, *excluding* sleeping car companies and express companies. Thus express companies are there mentioned to be taken out of the expression "carrier by railroad."

From this, we will see that for the purposes of future administrative legislation as to them, express companies are now mentioned only once in the Act. It thus appears that Congress has never made a separate code for the control of express companies, but that in putting them under the Act, it made them subject to the legislation applicable to railroad companies, unless the context showed a different intent. If this be not true, there are then no administrative provisions of the Act applicable to express companies.

Discussion of the Case of Wells Fargo & Company vs. Taylor, 254 U. S., 175

This case is discussed in the majority opinion (R. 124). It does not apply, for the reason that the term "carrier by railroad" was not defined in the Employers' Liability Act, (out of which that case arose), while the term "common carrier" has been defined in the Interstate Commerce Act to include express companies; and the word "carrier" has been also there defined to mean "common carrier". The Court, in making its decision in the Taylor case, clearly had this fact in mind. We quote from the opinion at page 187 as follows:

"In our opinion the words 'common carrier by railroad,' *as used in the act,* mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the *ordinary acceptation* of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see Southern Pacific Co. vs. Jensen, 244 U. S. 205, 212-213); by the obvious reference in the latter part of sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad empoyees (see San Antonio & Aransas Pass Ry. Co. vs. Wagner, 241 U. S., 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown 1 I. C. C. 349; United States vs. Morsman, 42 Fed. Rep. 448; Southern Indiana Express Co. vs. United States Express Co., 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see American Express Co. v. United States, 212 U. S. 522, 531, 534." (Italics ours).

Attention is called to the fact that the court restricted its definition of this phrase to its meaning "as used in the Act." The Act there under construction was the Federal Employers' Liability Act of 1908, and not the Interstate Commerce Act.

The Court also called attention to the fact that similar words in the original Interstate Commerce Act had been so construed as not to include the kind of express companies which were being then dealt with. The Court dealt with the fact that this phrase had been so construed in the *original Act,* with the knowledge, of course, that the Act had been amended many times since then,

and in limiting the construction of the word to that as used in the "*original* Interstate Commerce Act", the Court manifestly meant to call attention to the fact that it did not refer to the meaning of this phrase in the Act as amended.

The Court then calls attention to the fact that this phrase in its "ordinary acceptation" does not include express companies. In mentioning its "ordinary acceptation," there is a clear implication that the same phrase might very well have another acceptation.

In the original Act, jurisdiction was given over common carriers wholly by railroad and partly by railroad and partly by water. This was held insufficient to include express companies, because of the "ordinary acceptation" of the expression. In 1906, this "ordinary acceptation" was changed by legislative definition, by which the words "common carrier" as used in the Act, were declared to include express companies.

Here then, is the legislative Act which changed the meaning of this phrase from its "*ordinary acceptation*" so as to make the same include express companies. The Court, in referring to the use of similar words in the original Act, had knowledge of their use in the amended Act, which gave to it the special legislative meaning just referred to. It is reasonable to presume that the Court in the Taylor case restricted its definition of the phrase to its use in the Federal Employers' Liability Act, because of its knowledge that the original Interstate Commerce Act had been amended and that in the amendment, the phrase had been given a legislative definition. The change "was a legislative reversal of previous construction, whether by Commission, courts or public." (R. 124-125).

Mention in the Employers' Liability Act of cars, engines, track, roadbed and other property pertaining to a going railroad, and reference to the statutes requiring the engines and cars to be equipped with automatic couplers, etc., were deemed by the court to be important aids in ascertaining the meaning of the phrase as there used. The court then refers to the use of the same words in other statutes and to the construction of similar words in the original Interstate Commerce Act.

The words "carrier by railroad" were imported into Section 15 (4) of the Act by the amendment of February 28, 1920. The Court of Appeals for the Fifth Circuit decided the Taylor case, February 28, 1918, (249 Fed., 109), holding that the phrase "common carrier by railroad" as used in the Federal Employers' Liability Act did include express companies. So that when Congress used this expression in the Amendment of 1920 to the Interstate Commerce Act, there was an authoritative decision that, even in the Federal Employers' Liability Act, the phrase included an express company. The Supreme Court did not reverse the decision of the Court of Appeals until December 6, 1920, or nearly ten months after Congress had adopted its amendment of February 28, 1920.

This Court, in deciding the Wells-Fargo case, was dealing with the Act which regulated the relation of master and servant in the operation of railroads in interstate commerce. The relation of master and servant did not exist as between the express company and the employees of the railroad company which was operating the railroad, and, as pointed out by the Supreme Court in this case, the employees of the express company on the trains of the railroad company were not employees of the

railroad, but were exclusive employees of the express company and the negligence at which the Employers' Liability Act aimed, was negligence in the operation of the railroad, or in the track, roadbed and equipment of the railroad, things which were peculiarly within the scope of a railroad corporation.

A Consideration of the Context in Connection with Which the Expression "Carrier by Railroad" Was Used in Section 15 (4)

The majority opinion in the case at bar did not find it necessary to resort to the context, saying:

> "The case, indeed, is not one of ordinary construction, in which the reasonable intent of Congress is to be gathered from the context, but is rather one of executing a postive legislative mandate, defining terms." (R. 126).

We think that this statement is entirely correct and that it should control; but if it be not correct, the same result should be reached by a consideration of the context. Of course, context is one of the most powerful elements in the construction of a statute. Genert vs. Limbach, 50 Sou. 903, 904.

In the part of the Act now under consideration, the context is entirely different from that of the Federal Employers' Liability Act, and there is an absence of the expression, "cars, engines," etc. The decision of the Interstate Commerce Commission in the Express Case, 1 I. C. C., 349, holding that an express company was not within the meaning of the Act, dealt with the Act as it then stood, which was of course long prior to the legislative definition given to the terms "common carrier" and "carrier," by the Hepburn Act of June 29, 1906. The

legislative definition of 1906 given to the words had for its purpose the changing of conditions in reference to express companies as they had existed prior to that time.

Paragraph 3 of Section 15 authorized the Commission to establish through routes, joint classification and joint rates, fares or charges applicable to the transportation of passengers or property. The Commission correctly holds that this power "includes express traffic."

Thus, we start with the context which confessedly includes express companies. We are dealing with a rule which "applies to parcels as to car-loads" (24 I. C. C., 387).

The next paragraph prohibits the Commission, with certain exceptions, from requiring any carrier by railroad, without its consent, to short-haul itself. Following this, there is a proviso that in time of shortage of equipment, congestion of traffic or other emergency declared by the Commission, it may establish temporarily such through routes as in its opinion are necessary or desirable in the public interest. Of course this latter provision should apply to express companies, for in case of emergency, the public interest might well need this extraordinary power, as well for express as for ordinary freight transportation.

Express companies were imported into the Act to Regulate Commerce June 29, 1906. They were an agency by which numbers of railroads are combined into one instrument of transportation. Therefore, when they came under the Act and performed transportation by railroad, they necessarily became carriers by railroad, and this idea is the basis for the Commission's holding that they are "arms of the railroad."

We thus find that in the third paragraph of Section 15, which gives the Commission power to order through routes, the language includes both freight and express. We then find that in the proviso to paragraph 4, the emergency provision applies to express as well as to freight. The argument then is that the first part of paragraph 4, which is sandwiched between the two provisions just referred to, should be given a meaning narrower than is confessedly given to that part of the Section which precedes it, and as well, to that part which follows it. Of course, paragraphs 3 and 4 of Section 15 are to be construed together. The majority opinion so states (R. 126).

Another and important part of the context in which this phrase is used in this part of the Act, is to be found in the first paragraph of Section 6, as follows:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route *of any other carrier by railroad*, by pipe line or by water when a through route and joint rate have been established." (Italics ours).

This paragraph of Section Six (6) was amended into its present form by the Hepburn Act (June 29, 1906), which (Sec. 1, par. 3) changed the meaning of "common carrier" to include express companies and of the word "carrier" to mean "common carrier."

There can be no lawful rate for interstate carriage which is not published in the manner provided by the Act. That part of the Act which deals with the duty of

publishing a through rate is of course to be construed especially in connection with the other part (Section 15 (4), which deals with the circumstances under which through routes may be ordered.

If the expression "carrier by railroad" as there used does not include an express company, then there is no obligation on the part of the express company to publish rates on a through route with any other express company.

If we attribute to the phrase "carrier by railroad" as there used, a meaning broad enough to include express companies, this provision of the Act will be sufficient to require publication of through rates by all carriers of property, including pipe-lines.

If this expression as there used is not sufficient to include express companies, then there is no requirement for the publication of through rates by one express company with another express company. If such rates be not filed and published as required by the Act, there can be no joint routes. Clearly, Congress meant in this connection to require publication of such rates by railroad companies, express companies, carriers by pipe-line and carriers by water. It there used the expression "carrier by railroad" to include railroad companies and express companies. It used the expression "carrier by pipe-line or by water" to include the other carriers of property. The expression "carrier by railroad" and "carrier by pipe-line or by water" were intended to include all carriers of property which are subject to the Act.

If we do not attribute to Congress the intent to include express companies in the expression "carrier by railroad" as here used, we are forced to attribute to it an intent to *exclude* express companies from this provision.

The majority opinion (R. 125) deals with great clearness, with this Section as follows:

> "In this same Act, in its amendment of Sec. 6, is, so far as we can find, the first used (use) by Congress of the short expression 'Carriers by railroad'. It occurs in the requirement that 'Carriers subject to the Act—all of them —shall file and publish their rates from points on their own lines to those on the lines of "*other carriers by railroad, by water, or by pipe-line.*" ' Very plainly all the carriers subject to the Act are intended to be included in this threefold classification and 'Carriers by railroad' includes not only railroad companies, but express and sleeping car companies which use railroads in carriage. It was a short equivalent for the language of Section 1, 'Common carriers engaged in the transportation of passengers or property by railroad' and included what that included." (Italics from record).

The minority opinion takes no issue with this construction of Section 6 of the Act (R. 130). The Commission has substantially construed this Section in accordance with the opinion of the Court. *Cultra vs. Western Union Telegraph Co., 44 I. C. C., 670.*

Thus, we see that Section 6 makes a part of the context in which Section 15 is to be construed; for one section deals with joint routes and the other with joint rates applicable over them. In this part of the context, the Commission holds that the phrase "carrier by railroad" includes express companies. The phrase should of course have the same meaning when dealing with the reward as when it fixes the duty.

There are two rules to apply in construing the phrase "carrier by railroad" as used in Section 15 (4). One is "the dictionary of the Act." The other is the context in which the phrase is used. If the "dictionary of the

Act" applies, it controls. If it does not apply, the context controls. The definition contained in the "dictionary of the Act" forces the inclusion of express companies; but if this were not so, the context in which the phrase is used is itself so very strong that it leaves no other rational meaning.

The Commission has itself recognized that the definition of this very phrase, appearing in the first section of the Act, controls.

In 1 I. C. C., 677-682, the Commission says:

> "Therefore, the definition of the first section controls the application of the law by stating what carriers are within its terms, and the implication at once arises that common carriers exist which are not subject to the provisions of the Act."

The first section of the Act is there treated as defining the carriers which were then subject to the Act, and that definition was made to extend throughout the Act.

Our contention is in exact accord with the principle there stated by the Commission, which is that the definition contained in the first section of the Act as to what carriers are subject to the Act, should now control. Our further contention is that the definition contained in the first section of the Act was changed by the Hepburn Act of June 29, 1906, by which change the definition was broadened to include express companies. Of course, the Commission does not contend that the definition was not so broadened. The basis of the Commission's right to assert any power in the premises is the fact that the definition was broadened to include express companies.

It was not intended even by the amendment of 1906 to bring all express companies under the Act. Express

companies which carry only by truck or wagon, or which carry solely by water, or by water and truck, are not subject to the Act. It is only those express companies which carry wholly by railroad or partly by railroad and partly by water, which are subject to the Act.

There is no such means of carriage as carriage by express. There is carriage by railroad, by water, by highway and by air.

> " 'Carrier by railroad' is an abbreviation evolved from the words of Section 1 of the original Interstate Commerce Act: 'Common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water.' " (R. 124).

In paragraph 6 of Section 15, the Commission is given jurisdiction over divisions of joint express and other rates and it is required in prescribing such divisions to "give due consideration among other things to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes and a fair return on their *railway property* held for and used in the service of transportation," etc.

Of course there must be a fair return on the railway property held for and used in the service of express transportation, just as there must be a fair return on the railway property held for and used in the service of mail transportation. The power to establish through routes is connected with the power to divide the reward arising therefrom. In requiring the consideration of the value of railway property in this connection, there is no exception as to express companies.

All parts of the act which relate to through routes cannot be made applicable to express companies, if the

restricted meaning attributed by the Commission is to be applied to the expression "carrier by railroad." All of these parts of the Act can be used, if the phrase is given the meaning contended for by the American Company.

The decision of the Interstate Commerce Commission in the matter of express rates, practices, accounts and revenues (24 I. C. C., R. 381) shows clearly that the Commission then regarded Express Companies as "carriers by railroad" and applied the same rules to them.

This case was decided in 1912.

On page 387 the Commission says:

> "The Act to Regulate Commerce now imposes upon all of the railroad carriers the obligation to make through routes and to furnish proper facilities for the transportation of freight. This rule applies to parcels as to carloads. The Act also by name recognizes the Express Company as a carrier subject to our jurisdiction. We must, therefore, regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own."

On page 389 the Commission says:

> "We have treated the express company as an agency of the railroad, furnishing passenger train movement for small packages of freight, extending its service to the door for the gathering of the package at the point of origin, giving special care to the shipment during transportation, and again extending its service by wagon to the door at point of destination."

On page 418 and page 419 the Commission speaking of the value of express property as a rate basis says:

"A reasonable express rate may not be fixed upon the basis of the value of the property owned and used by the Express Company * * * An express company is, in contemplation of the decisions of the Supreme Court in the Express cases, an agency of the railroad for doing small parcel business * * * * It has no right to impose unreasonable rates by reason of the exclusive contract which it enjoys with the railroad. It must be treated as the railroad itself would be treated. It is an arm of the railroad; it is the railroad itself reaching out to the door and taking the package and delivering it again personally to the consignee. * * * * It is the railroad property which gives the greater part of the service upon which a reasonable return should be allowed, and not the Express Company, the value of whose property is comparatively insignificant."

And again on page 431 the Commission speaking of the standard of rates, says:

"It is proper for the Government to treat the Express Company as a freight forwarder by passenger train, giving supplemental service at each terminus and intermediate care."

If the phrase is construed as the American contends, it will keep the law in line with the decisions of the Commissions and Courts. Any other construction must put express companies into a class by themselves, and apply to them theories which have always been thought to be both unjust and unreasonable.

Some of the Authority which the Commission Surrenders if it Holds That the Term "Carrier by Railroad" does not Include Express Companies

(1). It must lose jurisdiction over express companies themselves, for, under Section 1, the provisions of the Act apply only to common carriers engaged in the trans-

portation of passengers or property, wholly by railroad, or partly by railroad and partly by water. In other words, the express company must be a common carrier either wholly or partly by railroad, before it is subject to the Act.

(2). Such ruling will deprive the Commission of the power to give directions in reference to the handling and routing, and the movement of traffic by an express company, when that company is, in the opinion of the Commission, unable to properly serve the public.

(3). It will relieve the express company of the duty of filing rates between points on its own routes and points on the routes of any other express company.

(4). It will take express companies out of the provisions of the Elkins Act, in so far as that Act relates to the failure of filing and publishing tariffs as to through express rates.

(5). It will deprive the Commission of power to regulate extension of credits by express companies.

(6). It will deprive the Commission of power to require express companies to keep the names of their agents posted.

These statements are not intended to be inclusive of all the powers the Commission will lose by this construction.

It is Fundamental in the American Law of Common Carriers That the Originating Carrier Should not be Short-Hauled

The originating carrier should not be required to short-haul itself, except in most extraordinary circumstances.

It has been recognized time and again by the Commission that the originating carrier is entitled to the long haul. ***There is probably no exception to this rule except that made in the order now under consideration.*** **Some of the expressions of the Commission on this subject are as follows:**

> "The law upholds a carrier in retaining tonnage to its line where the transportation can be performed upon equal terms, with reasonable dispatch and without undue discrimination."
>
> Suffern Grain Co. vs. I. C. R. R., 27 I. C. C., 192.

> "The long haul is generally conceded to the originating line."
>
> Salt rates from Wisconsin to Iowa,
> 27 I. C. C., 526-529.

In through passenger routes (16 I. C. C. 311) the Chairman (Knapp) said:

> "In the absence of a *real public necessity*, it seems plainly equitable, by compelling connections and through routing, to take from a carrier traffic for the accommodation of which it has expended millions of dollars and practically turn over that traffic, with the use of the carrier's terminals, to a competitor which does not see fit to provide for itself the needful railway and terminals."

This position was substantially adopted by the Court in I. C. C. vs. D. L. & W. Railroad, 216 U. S. 531-537, where it is said:

> "The object of the statute was not to give a roving commission to every road that might see fit to make a descent upon a main line."
>
> "The law contemplates protecting a carrier in its long haul on the traffic which it originates."
>
> Commercial Club of Superior, Wisc. vs. Great Northern Ry. Co., 24 I. C. C., 96-113.

"The Commission ordinarily will not lend its aid to an effort by one carrier to secure traffic that is reasonably tributory to another line by compelling the latter to join with it in through routes and rates."

Cin. & Col. T. Co. vs. B. & O. S. W. R. R. Co., 20 I. C. C., 486.

In the same case, the Commission says:

"As the section now reads, the only limitations on our authority to establish through routes and joint rates that need be mentioned here are (a) We may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of the road between the termini of the proposed through route. (b) We may not establish through routes and joint rates between a steam railroad and a street electric passenger railway that does not transport freight in addition to its passenger and express business. *The first of these limitations must, of course, be observed in all cases; the second has no application in connection with this complaint.*"

"Originating lines, generally, are entitled to the longest haul they can perform where the transportation can be performed upon equal terms, with reasonable dispatch and without undue discrimination."

The Columbia Gold Mining Co. vs. Ore-Wash. R. R. & Navigating Co., 35 I. C. C., 42-43.

"That the law upholds the carrier in retaining tonnage on its line where the transportation can be perfomed with reasonable dispatch and without undue discrimination, is well settled. See Suffern Grain Co. vs. I. C. R. R., 27 I. C. C., 192-194; Wheeler Lumber, Bridge & Supply Co. vs. A. T. & S. F. Ry. Co., 30 I. C. C., 343-344. It is also settled that our authority under section 15 of the act to establish in the first instance, or to continue in force voluntarily established through routes and joint rates, is limited to the extent that we may not require a carrier, without its consent, to embrace in such through route substantially less than the entire length of its railroad between the termini of the through route, unless to do so would make such through

route unreasonably long as compared with another practicable through route which could otherwise be established. Marble Rates from Vermont Points, 29 I. C. C., 607-608.

The Ogden Gateway case, 35 I. C. C., 131."

45 I. C. C., 227.

"The statute provides that in establishing joint rates and through routes, each carrier against which the order is made shall be given the benefit of the long haul by its own line 'unless to do so would make such through route unreasonably long as compared with another practicable route which could otherwise be established.' We cannot, therefore, establish in every case a through route and a joint rate, but must work under the limitation imposed by the Act of Congress as above set forth."

Investigation of Alleged Unreasonable Rates and Practices on Meat, 23 I. C. C., 656-662.

"If a railroad has traffic in its possession, it should be allowed to handle it by its own line, as far as it can, unless the public will suffer thereby."

Waverly Oil Works vs. Penna. Railroad Co., 28 I. C. C., 621-630.

The Commission in its report in this case (R. 20) holds that paragraph four of section fifteen (15) of the Act does not apply to Express Companies.

The Commission arrived at this conclusion by putting express companies into a class all to themselves. Let us see how ill this fits into the Commission's former decisions in 24 and 28 I. C. C. There it was said that "the Act to Regulate Commerce now imposes upon all the railroad carriers the obligation to make through routes and to furnish proper facilities for transportation of freight. This rule applies to parcels as to carloads." In other words it is there declared that the law applicable to railroad carriers as to through routes applies to parcels as well as to car-loads. That is, it

applies to express companies as well as to railroads. The Commission also there declared:

> "We must therefore regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business to which these agencies have added a service that is distinctive and peculiarly their own."
>
> 24 I. C. C., 387.

The Commission then said that the express company "*must be treated as a railroad itself would be treated. It is an arm of the railroad; it is the railroad itself reaching out to the door and taking the package and delivering it again personally to the consignee.*" 24 I. C. C., 419. If the express company is to be "*treated as the railroad itself would be treated,*" then it should not be required to unnecessarily short-haul itself.

That there is a natural justice in permitting the originating carrier which initiates shipments to carry them forward and to have the revenue therefrom, is again recognized by the Commission in Dakota Junctions, 81 I. C. C., 275; Western Mines, 66 I. C. C., 108.

Other cases recently decided by the Interstate Commerce Commission making like expressions, are:

> Transit on Lumber & Forest Products in Carloads in Washington, Idaho & Montana, 83 I. C. C., 451, 458.

from which we quote:

> "Within certain exceptions, a carrier may properly insist, as to traffic which it originates, upon including in a through route so much of its line as lies between the points of origin and destination, provided such route is not unreasonably long."

and

Simms Oil Co. vs. Houston & Texas Central R. R. Co., 85 I. C. C., 537, 538-9.

The Court below, in dealing with this part of the subject, said (R. 126):

> "Leaving discussion of words, we are confirmed in this interpretation by considering the possible reasons which may have moved this enactment. The main purpose was, in substitution for the original prohibition against establishing another through route when one was already in existence, to extend protection to initial carrriers by railroad against being compelled unnecessarily to 'short-haul themselves.' Reasons which occur to us as perhaps moving thereto are: (1) The natural justice in permitting one who initiates a thing to carry it forward and reap its benefits as far as possible. This has been recognized by the Commission in Dakota Junctions, 81 I. C. C., 275, Western Mines, 66 I. C. C., 108, and by this court in American Railway Express Company, v. Railroad Commission of Georgia, 274 Fed. 649. This reason would apply as strongly to an express company as to a railroad company. (2) The amendment of 1906 had imposed on the initial carrier responsibility for the whole carriage. It would seem right that it carry and control the shipment as far as possible—a reason applying with equal force to railroad and express companies. (3) The uncertainty, delay and risk of loss and damage incident to unnecessary transfers would apply equally to freight and express. (4) The investment of the carrier on which it must make a return may differ in degree as between railroad and express companies, but not in substance."

The opinion of the Court is not only in line with what it terms the "natural justice" of the situation, but it is in line with the previous rulings of the courts and of the Commission.

A carrier should be allowed to use the facilities which it is required to keep and furnish. (A. T. & S. F. Ry. Co. vs. United States, 232 U. S., 199).

The American Company is compelled to keep its plant and organization and facilities at tremendous expense; it should be allowed to use them, unless this use contravenes some well established prohibition of the law.

The Power of the Originating Carrier to Retain Traffic for the Long Haul is a Property Right

The authorities quoted in the preceding section of this brief are themselves sufficient to sustain the statement that the power of the originating carrier to retain traffic for the long haul is a property right. It is not contended that this may be exercised to the extent that traffic is unreasonably delayed nor that in its exercise a route may be established which is unreasonably long as compared with another practicable through route which could otherwise be established.

The Commission has recognized that the originating express carrier has this right, for in its report in 24 I. C. C., 411, it states:

> "We have said to these carriers in connection with the discussion of the establishment of through routes and rates that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own lines, and that division shall be agreed upon which shall compensate the originating carrier for its sacrifice."

We have pointed out that the Commission has found in the matter of Through Passenger Routes, 16 I. C. C., 309, that this right as to both passenger and freight business is a thing of value to the railway which should be protected, in so far as it can be done without in-

fringing upon the rights of the public. In considering this last case in 216 U. S., 538, the court thought that "the personal preferences" do not make a sufficient basis for depriving the carrier of its long haul. The Court further said that "the condition in the statute is not to be trifled away." That is, the conditions in the statute for the protection of the originating carrier would be carefully guarded.

The same thought is expressed in Kentucky & Indiana Bridge Co. vs. L. & N. R. R. Co., 37 Fed., 567, 633. We are not dealing in the case at bar with a mere administrative order. It is purposed to take the property of a carrier. The originating carrier is to be required to provide facilities and equipment and to utilize those facilities and equipment in a specified manner, necessarily with a great loss of revenue. The order is, on principle, very much like that complained of in State of Washington vs. Fairchild, 224 U. S., 510, where the court said:

> "An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order, but is a taking of property; to be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity and not unreasonable or arbitrary."

In that case, the question was the establishment of certain side tracks and the Court held that the order of the Commission was not merely administrative, but was a taking of property.

The bill in this case recites the great amount of property involved in the making and maintaining of the American Company's organization, the large amount of

real estate and equipment, and the thousands of men and women who are employed and who must be paid to render this service, and who, scattered throughout the country, work in coordination and make the organization of this Company. In addition to this, there are the many trains, cars and engines, together with the roadbed and terminals and terminal facilities which are afforded by the railroads in conducting this business. The power which it is sought to exercise in this instance must have been either clearly conferred or it does not exist. If the power exists, it must be exercised within the limitations of the statutes, and reasonably and not arbitrarily.

The Development of the Law as to the Establishment of through Routes and the Shipper's Right to Route

(1). The control of the carrier's business rests in the first instance with it. The power of the carrier over its business, as it was at common law, remains unimpaired except as it has been altered by the Interstate Commerce laws.

United States v. I. C. R. R., 44 S. C. R., 189.
I. C. C. vs. B. & O. R. R., 43 Fed., 37-56;
I. C. C. vs. Chicago Great Western R. R., 209 U. S. 109, 119;
Southern Pacific Co. vs. I. C. C., 200 U. S., 536, 554.

(2). At common law, a carrier could not be required to issue through bills of lading or to establish through routes. This proposition is established beyond dispute.

Southern Pacific Co. vs. I. C. C., 200 U. S., 536;
A. T. & S. F. R. R. Co. vs. D. & N. O. R. R. Co., 110 U. S., 667, 680.

(3). Under the original act adopted February 4, 1887, there was no power vested in the Commission to require the making of through routes. See authorities above cited.

(4). The first amendment to the Act which undertook to give power to the Commission, after hearing, to establish joint rates and through routes, is the Hepburn Act of June 29, 1906. The Commission was there given the power, after hearing on complaint, to establish through routes and joint rates as the maximum to be charged, and to prescribe the division of such rates and the terms and conditions under which such through routes should be operated, "provided no reasonable or satisfactory through route exists."

It was held by this court in I. C. C., vs. D. L. & W. R. R. Co., 216 U. S., 531, that this proviso was jurisdictional.

(5). The next development was the Act of June 18, 1910, which substantially re-enacted the Act of 1906, leaving off the provision as to the existence of satisfactory through routes. It was, however, provided that:

> "In establishing such through route, the commission shall not require any company, without its consent to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." (Sec. 15 (D), 24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. L. 552).

Paragraph (E) of Section 15 of the Act of 1910, gave the shipper the right to route in this language:

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided, to which through routes and through rates such a carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination", etc.

The effect of the Act of 1910, besides giving the Commission the power to act upon its own initiative, and making somewhat more obligatory its duties in the premises, eliminated the proviso above referred to, which made its jurisdiction depend upon the fact that no reasonable or satisfactory through route was then in existence. It provided, however, that the Commission should not require any carrier, without its consent, to embrace in such through route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless to do so will make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

This provision is now as much a part of the jurisdictional essentials of the exercise of the Commission's power as was the previous requirement as to the existence of a reasonable or satisfactory through route.

(6). The next change was that brought about by the Act of February 28, 1920, which amended paragraphs

3 and 4 of Section 15 of the Act, to read as they now stand, as follows:

"(3) The Commission may, and it shall, whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and the division of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

"(4) In establishing any such through route, the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line, require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could other-

wise be established; Provided, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Thus we see that the development of the law has been, not in sudden changes, but beginning with 1887, when there was no power in the Commission over the subject, to the Act of 1906, which gave a limited power to the Commission, to the Act of 1910, which also gave a limited power to the Commission, and then to the Act of 1920, which likewise gave a limited power to the Commission, the development of the law has been always in keeping with the proposition that the originating carrier should not be unnecessarily short-hauled, and that the right of the originating carrier to carry to destination, when that could be done with reasonable service to the public, is a property right, and that changes which would bring about alterations in this property right, should be accompanied by proper safe-guards, and its operations limited by proper restrictions. This is in keeping with the opinion of the Court of Appeals for the Fifth Circuit, in the case of Gulf, Colorado & Santa Fe Railroad Co. vs. Miami Steamship Co., 86 Fed., 419, where it is said:

"Such a scheme for establishing compulsory through rates should be surrounded by proper safeguards and its operation limited by proper restrictions."

The Commission apparently contends for an "unlimited power" over this subject matter, and the South-

eastern Express Company contends that the Commission should have unlimited power to take the business of the American Company and give it to the Southeastern.

The line of demarkation between the contending forces in this case is that the American contends that the power of the Commission is limited by statutory and definite restrictions, and as well, by the restriction that all of its acts must be reasonable and just. The appellants contend that the power of the Commission is an "unlimited power." Just as this is the demarkation between the contentions of the parties, so it is the demarkation between the majority and minority opinion. The majority opinion, as we have seen, holds that the power of the Commission over the subject is accompanied by limitations. The minority opinion holds that:

> "In establishing through routes for express companies and in dealing generally with them, the Interstate Commerce Commission has practically unlimited power, including that to require routings by shippers to be compiled with; provided always its acts are just and reasonable, and not arbitrary." (R. 132).

Thus, the minority opinion, agreeing with the appellants, undertakes to confirm into the Commission unlimited power over a subject with which Congress and the courts have always dealt as one to be treated under proper safe-guards.

Manifestly, this radical departure from precedent and from the natural justice of the situation, should not be sanctioned except upon the clearest statutory direction supported by constitutional grant.

The Commission did not believe the shipper's right to route was in the public interest at the time the Commerce Act of 1920 was on its passage.

See

Clark on Interstate Commerce, 30-31.
(Published by John Byrne & Co.)

Discussion of the Decision in the Case of the American Railway Express Company vs. Railroad Commission of Georgia, 274 Federal, 649

This decision was rendered by the United States District Court for the Northern District of Georgia (three judges sitting,—Circuit Judge King, and District Judges Evans and Sibley). It involved an order of the Georgia Commission to very much the same purpose as is the order now under consideration, except, of course, the one was confined to intrastate commerce in Georgia, and the other to interstate commerce. The Court in that case declared that

> "It never was intended to permit one carrier to short-haul another in the interest of its own business, unless a most decided case of promotion of the public service demanded it."

The Court made this utterance in construing the power of the Georgia Commission to fix "just and reasonable joint rates." It held the Georgia Commission's order void. It did not undertake to enjoin the Commission from establishing through routes and joint rates upon reasonable and just principles. It left the Commission unaffected in its power to designate through routes and to fix rates applicable thereto, when those routes were designated and when they were made in accordance with the principles announced in the decision. The Court states:

> "Where a carrier is furnishing reasonable facilities to the public, it cannot be required to open its exclusive bus-

iness facilities to a competitor, or to enter into joint arrangements with it to promote its business. We therefore think that in this case, if the Commission establishes joint rates between these carriers, it should designate the routes over which such rates are to apply and the division thereof *in the light of the above principles.*"

The Commission in the report now under consideration, holds that

> "Under section 15 (3) we have not only the power to require through routes and joint rates, but also to prescribe the 'terms and conditions under which such through routes shall be operated'; and *under this power we may provide for the right of the shipper to route.*" (R. 31).

The Commission thus necessarily holds that the shipper has no right to route express shipments, but that the Commission itself may empower the shipper of express to select between established routes. At most, this power is a discretionary one in the Commission.

The discretion of a body created by law is a legal discretion and not an arbitrary one. It is to be exercised reasonably and justly; it is not to be exercised in doing that which is unreasonable and unjust. (See Nashville Grain Exchange vs. United States, 191 Federal, 37).

Congress thought that it was unjust and unreasonable to require a carrier by railroad, without its consent, to embrace in a through route substantially less than the entire length of its line, unless to do so would make the through route unreasonably long.

Express shipments have always been referred to as a species of freights. (See in Re Express Companies, 1 I. C. R., 677). This opinion starts off with the statement:

"A considerable part of the movement of freight from one state or territory to another throughout the United States is carried on by so called 'express companies' ". (See like references in 24 I. C. C., 389, 424, 426).

No one questions the right of the Commission to establish through routes within the limitations provided by the Act, and which are just and reasonable. We say that it is both out of the specific limitations of the Act and also unjust and unreasonable and therefore, on that account, outside of the scope of the Act for the Commission to establish a route for the purpose of depriving the American of its long haul. Such a route is certainly not necessary and we are quite convinced that it is not desirable in the public interest. That the Southeastern may desire it, or that some few shippers may desire it, does not make it desirable in the public interest in the sense in which that term is used in the Act. Certainly, it was not intended that the power of the Commission could be set in motion simply to satisfy the whim of a shipper, but if we are wrong in this, the power once set in motion, must be kept within the limitations of the Act.

We must remember that we are "dealing with an administrative order that seriously affects property rights and does so by way rather of fiat than of adjudication," (I. C. C. vs. Northern Pacific Railway, 216 U. S., 544) and that such taking of property must be "justified by public necessity and not unreasonable or arbitrary." (State of Washington vs. Fairchild, 224 U. S., 510).

A bare personal preference does not make the route "desirable" within the meaning of this Section of the Act (I. C. C. vs. Northern Pacific Railway, 216 U. S., 544).

Of course a route which is "desirable" within the meaning of this Section must be one which can be established within the limitations upon the power of the Commission. The desire which will set in motion the power of the Commission must be of that kind which can be satisfied within the limitations on the power which is set in motion.

Who Are to be Considered in Determining Whether the Order of the Commission is Reasonable

At least three classes of persons are to be considered in determining whether or not this order is reasonable. They are: (1) The Carrier; (2) The General Body of Shippers; (3) The Specific Shipper.

If the order is unreasonable as to any one of these classes, it is unreasonable. The order would require the American Company to short-haul itself on a shipment from New York to Birmingham, to the extent of allowing it, the originating carrier, a haul of two hundred and twenty-six (226) miles against the haul of the Southeastern, connecting carrier, of about eight hundred (800) miles, when the shipment would be delivered to the consignee at substantially the same time as it would be delivered if carried all the way by the originating carrier, the American Company.

The Commission in its 23rd Annual Report, (1909) p. 7, stated that:

> "Ordinarily it is immaterial to a shipper by what route his traffic moves if it reaches its destination in due time, upon a proper rate, and with the desired delivery".

The rates are not in question (R. 29). It is not to the interest of the general body of shippers that the

American Railway Express Company's organization be broken down, nor that its business be pirated upon when, after all, the result is to accomplish that which is of no benefit to the shipper.

Existence of a Satisfactory Through Route

The Commission seems to have thought that because the law was changed in 1910, by striking out the following proviso:

> "Provided no reasonable or satisfactory through route exists",

it was thereby empowered to require an originating carrier to short-haul itself. We respectfully submit that this is incorrect. In the first place, the above mentioned proviso had nothing to do with the limitation upon the power of the Commission, after that had been once set in motion. It puts a limitation upon the setting into motion of the power of the Commission. What was intended to be accomplished by striking out this proviso, was to enable the Commission to require a carrier to establish routes with more than one other carrier. To illustrate:

A carrier by water from, say, Cleveland, desiring to make a through route to New York, through Buffalo, selects one rail line from Buffalo to New York to make the through route, thus discriminating against all other rail lines from Buffalo to New York. This discrimination was entirely within the power of the originating carrier until the amendment of 1910, if the route which it selected was otherwise satisfactory.

The amendment of 1910 undertook to empower the Commission to prevent this discrimination. It did not

empower it to require a carrier having a single line route from origin to destination to unnecessarily short-haul itself, nor did it intend to require that the originating carrier should give up its shipments at an unnecessary transfer point which short-hauls it.

This construction of the Act gives a field of operation to each of the provisions. The force which the Commission undertook to give to the fact that this provision was stricken would completely destroy the provision against short-hauling. Of course, each part of the Act must be so construed as to give vitally to every other part thereof.

> "It is to be presumed that all the subsidiary provisions of an act harmonize with each other, and with the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. Therefore, it is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself."
>
> See Lewis' Sutherland Statutory Construction, Vol. 11, Section 344.

> "Words expressive of a particular intent incompatible with other words expressive of a general intent will be construed to make an exception, so that all parts of the act may have effect."
>
> Lewis' Sutherland Statutory Construction, Vol. 11, Section 345.

> "The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it."

> "Where there is an act or provision which is general, and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily

so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general law would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act. That would be deemed an exception, unless the terms of the later general law manifested an intention to exclude the exception. If the general and special provisions are in the same act, or passed on the same day in separate acts, or at the same session of the legislature, the presumption is stronger that both are intended to operate."

Lewis' Sutherland Statutory Construction, Vol. 11, Section 346.

Competition

The Commission apparently based its initiation of these routes on its desire for competition (R. 29). We do not believe that this justifies the Commission in undertaking to establish routes. That is, we do not think that this fact was sufficient to set in motion the power of the Commission. Certainly it was not sufficient to enable the Commission to override the limitations which are placed upon its authority after that authority has been put into motion.

It is not the duty of a common carrier to surrender its rights in order that competition with itself may be created. The Commission has said that:

"The provisions of the Interstate Commerce Act with respect to the prospective consolidation of rail carriers contemplates that competition shall be preserved, but do not require that competition shall be inaugurated or increased."

See Consolidation of Express Companies, 59 I. C. C., 464.

It is only unreasonable or unjust discrimination which is prohibited by the Act. (U. S. vs. Illinois Central Ry.

Co., 44 S. C. R., 189, 192). Preferring to use that which one owns over that which someone else owns is not discrimination,—certainly not unreasonable or unjust discrimination, and this has been so recognized by the Commission.

In Waverly Oil Works Co. vs. Pennsylvania R. R. Co., 28 I. C. C., 621, the Commission said:

> "No unjust discrimination arises out of the circumstance that the different members of the Pennsylvania system accord the use of their Pittsburgh terminals to one another while refusing it on the same terms to their outside competitors."

The Courts make the same recognition, for it is held in Little Rock & Memphis Railroad Company vs. E. T. V. & G. Railroad Company, 47 Federal Reporter, 771, 776, as follows:

> "It is again the right of one to prefer one's self to another, and that cannot be an undue or unreasonable discrimination, however hardly it may bear upon that other, as long as the other is not molested in its business by a refusal to transport its passengers upon the same terms granted to the passengers of other roads."

In the same case, at page 778, it is held:

> *In either case, as we have endeavored to show, the right of preference growing out of the ownership is paramount to any demand of the public for competing lines in determining the reasonableness of the discrimination made in a case like this.*" (Italics ours).

At page 782, the court states:

> "It is a misnomer to call that which the Iron Mountain is doing 'a discrimination' against the plaintiff under the interstate commerce act, or any other careful use of that

word. It is not the case of a road preferring unjustly, unduly and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so conducting its business and using its powers of ownership as to divert travel from its rival to itself."

It is improper to call that which the Commission undertakes to allow in this case, competition. In its last analysis, it is a defeating of competition. If the Southeastern Express Company can, by the exercise of what is called "shipper's right of routing" cause the American Company to surrender its business to it at Washington, when that business has been picked up at such expensive terminals as New York City, why should the Southeastern undertake the expense of getting into those expensive terminals where this business originates? This simply permits the Southeastern to prey upon the property and organization and initiative of the American. Such a course destroys initiative on the part of the Southeastern and on the part of the American.

The Right of a Shipper to Route Express Shipments

The order in this case not only undertakes to establish the routes, but to direct that the shipper's routing thereover shall be obeyed by the originating carrier. We have heretofore undertaken to show that the right of a shipper to route did not flow from the creation of through routes; that in the beginning, the Commission had no power to establish through routes and that this continued until 1906. The Commission was then given the power to order the carrier to establish only one through route between any two given points; that is, the power of the Commission did not come into existence if one satisfactory through route had been already established.

Of course there was no power in the shipper to route when only one route was established. There was no room for selection.

In 1910, this provision as to the one satisfactory through route was stricken from the law and on that date, and as a part of the Act striking it from the law (June 18, 1910) paragraph 8 of Section 15 was adopted, and for the first time shippers were given the right to route. The apposite part of this paragraph is as follows:

> "In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided, to which through routes and through rates such carrier is a party, the person, firm or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination," etc.

The establishment of through routes in and of itself did not give the shipper the right of selection between the routes. This was recognized in Congress when the law was amended in 1910, to give the shipper the right to route. (See Congressional Record, Vol. 45, p. 3476). Senator Elkins, speaking to Congress in behalf of the Senate Committee on Interstate Commerce, in his discussion of this provision, said:

> "Giving the right to the shipper to route his shipments. That is a new provision in this bill * * *. Under existing law there is no obligation by statutory provision requiring

the carrier to route the shipment by a particular through route to which the carrier may be a party."

Senator Elkins also said at page 3466 of the same volume:

> "Heretofore, shippers have never had the right, since the first Act to Regulate Commerce was passed in 1887, to choose the route over which they could ship their own freight. This right or power has always been left to the railroad companies. Under the bill, shippers have the right to direct the route of shipment of their traffic."

The progress of the law on the subject of through routes has been as follows:

(*a*) A complete absence of power in the Commission to order through routes, with the correlative right on the part of the carriers to establish such routes as they deemed fit for through transportation.

(*b*) The conferring upon the Commission of the power to establish through routes under limited circumstances, but with no power in the shipper to route his shipments, this necessarily following from the fact that only one route could be established.

(*c*) The trial of this last method from the date of the Hepburn Act in 1906 to the Amendment in 1910.

(*d*) The drawing of a distinction by the Commission in its 23rd Annual Report in 1909 between the power of the Commission to establish through routes and the right of the shipper to select between the routes.

(*e*) The enactment by Congress of the Amendment of 1910 which gave the Commission power to establish routes with somewhat less limitation than it had under the Amendment of 1906, preventing the Commission

from requiring a carrier by railroad to short-haul itself, except in the circumstances mentioned in the Act, and giving the shipper the right to select between the routes thus established as to shipments delivered to "any railroad corporation being a common carrier."

The fact that routes have been established does not give the shipper, in the absence of statute, the right of selection between those routes. Under the common law, there is no doubt but that the carrier had the right to route its shipments. The originating carrier was not obligated to enter into contracts for through carriers, and, when it did enter into such contracts and establish through routes, it could select the carriers by means of which it would establish the through route. The Commission and this Court have amply recognized the correctness of this statement. The Amendment of 1910 was, no doubt, enacted by Congress in response to the suggestion made by the Commission in its 23rd Annual Report (1909, p. 7), where it made the following statement as to through routes:

> "Railroads ought not to be required to turn over their business to a competitor, but we think the Commission should have authority to establish joint routes and through rates whenever, upon investigation, it is found the public necessity and convenience, having due reference to the interests of the carrier, require such action."

The Commission then apparently recognized that the right of the shipper to select routes did not arise from the establishment of routes, but that the initiative as to the use of routes was still with the carrier, for in the same report, at the same place, the Commission said:

> "Of much the same character is the right to route traffic. The courts now hold, apparently, that carriers have this

right or at least that they may reserve it in their tariffs and may, therefore, as a practical matter, exercise it at will.

"Ordinarily, it is immaterial to a shipper by what route his traffic moves if it reaches its destination *in due time,* upon a proper rate and *with desired delivery. In such cases there is no apparent reason why the railroad ought not to be permitted to send that traffic by whatever route it may elect.* There are, however, circumstances under which the privilege of designating the route by which the traffic shall move is a matter of convenience as well as value to the shipper, and under such circumstances, his right ought to be protected. In our opinion the Commission should have authority, after investigation, to prescribe the conditions under which traffic may be routed by the shipper."

When the matter was before Congress, the committee on Interstate Commerce in the Senate in its majority report said, with respect to the restriction providing that the Commission should not embrace less than the entire length of a railroad in a through route:

"It would seem to be unreasonable to empower the Commission to require a railroad company having a line of its own between two designated termini to allow a portion only of that line to be taken and linked up with other lines for the purpose of creating another through route *in competition with it,* thus depriving it of the natural advantages of possessing a direct line between the termini, unless such line should happen to be so much longer than the proposed new through route as to make the establishment of such new route not merely an added convenience, but a *public necessity.*" (Congressional Record, Vol. 45 p. 2819).

Here, the Senate Committee on Interstate Commerce, in the very act of reporting the 1910 amendment to the Senate, tells the Senate that it would "seem to be un-

reasonable to empower the Commission" to do that which is now sought to be done.

The Commission did not seek, and the Congress did not grant, the power to authorize the shipper to select between established routes in all cases. The Commission was to provide the rules and regulations governing the exercise of this right.

The plan adopted by the Commission for the conduct of the express business in the 24 and 28 I. C. C. reports, is based upon the distinction between rates universally applicable and the unrestricted right of the shipper to route.

In discussing the right of shippers to route, Mr. Elkins, speaking on behalf of the Senate Committee on Interstate Commerce, said that this exception to the granting of this power to the Commission

> "is one that has always been recognized in the transportation business of this country. The road that initiates the freight and starts it on its movement in Interstate Commerce should not be required, where it has a line not unreasonably long, to transfer its business from its own road to that of a competitor, especially when the commerce initiated by it can be as promptly and safely transported from the point of shipment to the point of destination by its road as by the line of its competitor."

The right of selection of routes is with the carrier even after creation of more than one route, unless expressly taken away by statute, for the reason that the initiative over a carrier's business remains with the carrier except in so far as it is taken from it by statute. In Missouri & Illinois Coal Co. vs. Illinois Central Railroad, 22 I. C. C., 39-48, the Commission said:

> "The law does not assume that the Commission will take the initiative in this matter."

The Commission was there dealing with the establishment of joint routes.

> "The establishment of a through route does not necessarily mean that the traffic must move via that route where there are other possible routes."
>
> Okla. Portland Cement Co. v. A. L. & G. R. R., 32 I. C. 225.

The Commission asked Congress to give the right of selection to the shipper. Congress, as a part of the same section, and in the same amendment to the act, and most likely for the purpose of carrying out the request of the Commission, adopted what is now paragraph 8 of section 15.

The Meaning of That Part of Paragraph 3 of Section 15 of the Act Which Empowers the Commission to Establish the "Terms and Conditions Under Which Such Through Route Shall be Operated"

It is argued that the power to prescribe the terms and conditions upon which the through routes shall be operated gives to the Commission the right to empower the shipper to designate the route, and that it enables the Commission to authorize the shipper to require the originating carrier to be short-hauled. There are several answers to this:

The quotation is applicable to traffic moving by the railroad companies as well as by express companies. To construe the language in paragraph 3 as conferring upon the Commission the power to authorize the shipper to select between established routes over railroads is to treat paragraph 8 as having no field of operation. Certainly there is no need for paragraph 8 if paragraph 3 had the meaning attributed to it.

The above quotation as to the power of the Commission to fix the terms and conditions upon which such through routes shall be operated came into the Act in 1906. In 1909, we find that the Commission declared in its official report that not only the shipper did not have the power to route shipments, but the Commission itself did not have the power to give him that right. Furthermore, at the time this quotation came into the law, the power of the Commission to establish routes was limited to those conditions where no satisfactory through route existed, and there then being no field for selection by the shipper, because the Commission could establish only one through route. This provision could not have had to do at all with the matter of routing shipments by the shipper. It had to do with the *operation of the route.*

Paragraph 8 came into the law, as we have seen, in 1910, and in the debates in Congress and the reports of the committees in Congress on the subject, there was a clear recognition that that which had been previously done did not give either to the shipper or to the Commission the power of the selection of routes for the manifest reason that there were no routes between which selection could be made.

The Commission, having decided that an express company was not within the term "carrier by railroad" under Section 15 (4) put itself into the position that it could not decide that shippers by express had the right to route under Section 15 (8), because under that paragraph of Section 15, the right to route is given to shippers who deliver their property to "any railroad corporation being a common carrier." The Commission therefore fell back upon the clause of Section 15 (3) which, after giving the Commission the power to require

through routes and joint rates provides that the Commission may prescribe the "terms and conditions under which such through route shall be operated." We have demonstrated that the Commission could not confer the right to route upon shippers under this clause of Section 15 (3) of the Act. If shippers by express have not the right to route under paragraph 8 of Section 15 of the Act, then they have not the right to route; yet the Commission held in its opinion rendered on December 7, 1920, 59 I. C. C., 518:

> "The *statutory* right of a shipper to designate the routing of his traffic, and the correlative duty of a carrier to observe his instructions, come into play only where "two or more through routes and through rates have been established", etc. (Italics ours).

The Commission there thought that the right of a shipper to route was a statutory right in the circumstances there referred to. If the right to route by express is a statutory right, that is to be found only in section 15 (8). The language of paragraph 8 of section 15 is not very apt, and narrowly construed, it may not include a shipper by express, but the debate is between the shipper having the right to route growing out of Section 15, paragraph 8, or his being without the right to route. There is much reason for holding that it is not intended that the shipper by express should have the right to route, but the American Company has thought that paragraph 8 of Section 15 should be construed in connection with the whole Section 15, and when so construed, that it should be held to be broad enough to relate to shippers of express carried over a railroad.

That there are some parts of the Act which are inapt, is recognized by the Commission in

Morgantown and Kingwood Divisions, 49 I. C. C., 540-549.

The Order Complained of is Void For That it is in Violation of the Constituton of the United States and Especially the Fifth Amendment Thereto, in that it will, if Perfected, Deprive the American Railway Express Company of its Liberty and Property Without due Process of Law

The details upon which this proposition depends have been hereinbefore stated and discussed. The case of State of Washington vs. Fairchild, 224 U. S., 510, is an exact illustration of the invalidity of an order requiring a practice which the court has determined to be unjust and unreasonable. Another is the Atchison, Topeka & Santa Fe Railroad Co. vs. U. S., 232 U. S., 199, which is sometimes known as "the pre-cooling case."

Another is Great Northern Railway Co. vs. Minnesota, 238 U. S., 340. In that case, the court held:

> "The order of a state railroad commission requiring a railroad company to install and maintain scales amounts to a taking of the company's property; and, if the order is arbitrary or unreasonable, the taking is without due process of law and in violation of the Fourteenth Amendment."

At page 345 of this opinion, the court said:

> "The facts being established, the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not conclusive."

At page 346, the court holds that:

> "The demands upon a carrier which lawfully may be made are limited by its duty," etc.

In other words, the Commission has no right to require a carrier to establish routes and to submit to the routing of traffic unless the carrier is under a duty so to do, and to order it to do that which it is not under a duty to do, with the consequent surrender of the use of its properties and its revenue, is a taking of property without due process of law.

Also see C. B. & Q. Railroad Co. vs. Wisconsin, 237 U. S., 220. This case dealt with the stopping of trains. The headnote states:

> "This court may determine whether local facilities furnished by a carrier are sufficient, that fact being necessarily involved in determining the Federal question whether an order affecting interstate trains does or does not amount to a regulation of and interference with interstate commerce."

Of course the same principles apply in determining whether or not the order of the Commission amounts to a taking of property without due process of law.

We respectfully submit that the facts in the case at bar, as they have been reported by the Commission, do not show any justification for requiring the American Company to establish the joint routes prescribed in the order; nor do they justify the Commission in requiring the American Company to submit to being short-hauled in the manner therein prescribed, upon the bare desire of the shippers; that these facts make the order unjust and unreasonable, and that it is beyond the statutory power of the Commission in the instances herein pointed out, and it also violates constitutional limitations against the taking of property without due process of law.

The order being more than a mere administrative one, these principles apply with unusual force to it; and if

the order transcends either statutory or constitutional limitations, it is not the act of the Government at all.

Section 3 of the Act is Not Involved

One of the assignments of error by the Southeastern Company is that error was committed in granting the interlocutory injunction, because "such order disregarded the limitations put upon the power of the Commission found in paragraph four of Section 15 of the Interstate Commerce Act as amended."

This refers to the exceptions contained in paragraph four of the Act, which provides, in substance, that the limitation against short-hauling shall apply "except as provided in Section 3," etc.

The court below held that Section 3 was not involved, the court saying, at the bottom of page 123 and at the top of page 124 of the Record:

> "Section 3 is not sought to be applied, and the existing routes which embrace all the lines of the American Railway Express Company between the several termini involved, are not held by the Commission to be unreasonably long."

Section 3 provides against undue and unreasonable preferences or advantages to persons, companies, firms, corporations, localities or particular kinds of traffic, and prohibits the subjecting of any particular person, company, firm, corporation, locality or particular description of traffic to any undue or unreasonable prejudice or disadvantage and makes other provisions against discriminations. It is difficult to understand how Section 3 can be applied to any circumstances which have developed in this case.

The Commission does not find the existence of any such undue or unreasonable preference or advantage, or any undue or unreasonable prejudice or disadvantage. Such undue or unreasonable discrimination is inconsistent with the findings of the Commission in this case.

Of course it is the Commission which must, at least in the first instance, determine whether a rate or practice is discriminatory.

See

Keogh vs. C. & N. W. Ry., 260 U. S., 156-164.
Great Northern Railroad vs. Merchants Elevator Co., 259 U. S., 285, 291.
Texas & Pacific Railway vs. Abilene Cotton Oil Co., 204 U. S., 426-444.
Penn. Co. vs. U. S., 236 U. S., 351.

The Commission not having found the existence of such discrimination, the court will not. The Commission's decision was inconsistent with the thought that it is based upon the existence of unjust discrimination for it is placed upon the theory that the Express Company is not a carrier by railroad, and that the express company is not entitled to the protection reserved to carriers by railroad, and that the Commission does not labor under the limitations imposed by the Act upon their authority as to those routings as when dealing with carriers by railroad. If the Commission had meant to put its decision upon the basis that the exceptions apply, they would not have put their decision upon the other ground, for, if the exceptions apply, the provision against short-hauling does not apply.

Furthermore, the Commission dealt with the subject as a whole. Unjust discrimination cannot be found in any such sweeping generalities.

Moreover, discrimination is not and cannot be involved in this case, for that at the point of the proposed transfer, there are only two carriers; one the Southeastern, and the other the American Railway Express Company, and of course it is not unjust or unlawful discrimination for the American Railway Express Company to prefer its own lines.

The Uniform Express Contract of the American Railway Express Company has Been Specifically Approved by the Commission Under the Power Conferred on it by Section 5, (1) of the Act. The Fact That it May be a Pooling Agreement Has No Bearing or Relation Whatever upon the Power of the Commission to pass the Order Which is Challenged in this Case

Judge Bryan (R. 132) held that this contract was a pooling contract and from that, in part, he reached the conclusion that

> "In establishing through routes for express companies and in dealing generally with them, the Interstate Commerce Commission *has practically unlimited power* including that to require routings by shippers to be complied with; provided always its acts are just and reasonable and not arbitrary." (Italics ours).

This point was urged by the Southeastern Express Company before the Commission but the Commission does not appear to have been influenced by it for it does not refer to it in either of the opinions in this case, and the order is not predicated in any way upon this theory.

Moreover, this particular provision of the contract has been expressly approved by the Interstate Commerce Commission in Express Contract, 1920, 59 I. C. C. R. 518, decided December 7, 1920, and the consolidation of the

express companies now represented by the American Railway Express Company, was also specifically approved by the Interstate Commerce Commission in 59 I. C. C., 459.

There is nothing in the opinion of the Commission to indicate that it does not now approve the contract. On the other hand, the only utterances of the Commission on this subject, are its approval of the organization of the American Railway Express Company, 59 I. C. C., 459, 469, and the aforementioned approval of the pooling provisions of the contract between the American Railway Express Company and the railroads, (59 I. C. C., 518). These approvals must, of course, be considered as conclusive in so far as this hearing is concerned, because the Act commits the decision of that question in the first instance to the Commission and not to the Court.

The Effect of Rule 3 of the Express Classification

Rule 3 is as follows:

> "Shippers, by designation in writing, may route shipments by way of such established routes and transfer points as they may desire."

This rule came into the express classification with the Express decisions of 24 and 28 I. C. C. The Commission desired to avoid circuitous routing. This rule was a part of its plan to this end. The Commission says of the system there established:

> "The tariffs showed that all routes were open, but the express companies' practice of using direct routes eliminated and closed just as effectively as if by tariff publication, all indirect or circuitous routing." (R. 30).

There were several express companies in existence then. The rule had the effect of permitting the shipper to select between two or more established routes.

The Southeastern construed rule 3 to mean that every route was established, and that therefore, the shipper had the right to route over all routes (R. 30). Of course that was never intended. While contending for this construction, the Southeastern filed its unlimited concurrence. The American Company filed its limited concurrence, first opening routes only between exclusive offices of one company and exclusive offices of another, and then added other established routes as experience showed that they were necessary. This was the only means then open to the American Company, by which it could make a system which would avoid circuitous routing. Where these established routes now afford alternate routes, the shipper's right to select is confined to a selection between the established routes, just as it was at the time the rule was adopted.

It was contemplated that other routes would be used in case of emergency. That is one of the features which gave flexibility to the system. The route once used, or transfer point once used for a certain sort of traffic, did not establish that route so as to give the shipper the right of routing.

Any other construction would give the shipper unlimited right of routing, which would break down the system.

Because the American routes some traffic through Washington over the Southeastern lines, which it cannot handle itself, and which it must route in the interest of the public and avoid circuity of routing, does not make

this an established route for its other business which it can legitimately haul over its own routes south of Washington without circuitous carrying.

Rule 3, by its terms, refers only to established routes. No route is open to shipper's routing before it is established, nor after it ceases to be established.

The rule was never intended as a license to short-haul the originating carrier.

The Southeastern, having refused to re-establish the Direct Routing Committee for the establishment of routes, which Committee was created under the order of the Commission of November 30, 1912 (28 I. C. C., 136), express routes have been established since its coming into existence by tariff filings. The present order contemplates the establishment of routes by such filing. That means that routes are not established except as they are covered by such filing. Rule 3 operates to give the shippers the right to select between two or more routes established by such filing. The rule never had any other meaning. The method of establishing routes was different before the Southeastern's refusal to re-establish the Direct Routing Committee.

With the determination that the originating carrier should not be short-hauled in the circumstances herein set out, no doubt the Direct Routing Committee will be re-established and the system will drop back into the original plan of the Commission.

It is respectfully submitted that for each and all of the reasons herein set out, the decision appealed from should be affirmed.

H. S. MARX
T. M. CUNNINGHAM, JR.,
ROBT. C. ALSTON,
Attorneys for
American Railway
Express Company.

Addresses of Counsel:

H. S. Marx,
46 Trinity Place, New York.

T. M. Cunningham, Jr.,
Savannah, Ga.

Robt. C. Alston,
Citizens & Southern Bank Bldg.,
Atlanta, Ga.

APPENDIX NO. 1

The Development of the Statutory Power of the Commission to Establish Through Routes

1.

The first grant of power to establish through routes is to be found in the Hepburn Act of June 29, 1906.

Section 15 of the Act to Regulate Commerce, as amended by the Hepburn Act, contained the following:

> "The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such routes as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provisions of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."
>
> 34 Stat. L., 589, 590.
>
> 4 Fed. Stat. Ann. (2nd Ed.) 475.

It will be noticed that this amendment to the Act authorized the Commission to prescribe "the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provisions of this Act, etc."

In 1909, in its 23rd Annual Report, the Commission states, as has been pointed out in the brief, that the carriers had the right to route the traffic or that they might preserve that in their tariffs. The Commission did not think then that this power gave them the right to estab-

authorize shippers to route
~~lich routes~~ and they substantially so stated to Congress and Congress did not think so as we have heretofore pointed out.

2.

The next change in this part of the Act was brought about by the Act of June 18, 1910, and is embraced in Section 15 (C), (D), and (E), which said paragraphs of said Section are as follows:

Section 15 (C):

> "The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the commission have the right to establish any route, classifications, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water. (24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. L. 552)."

Section 15 (D):

> "And in establishing such through route, the commission shall not require any company, without its consent,

to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established. (24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. L. 552.)"

Section 15 (E):

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportion subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to much reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported. (24

Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. L. 553.)"

4 Fed Stat. Ann. (2nd Ed.) 469-471.
36 Stat. L. 552-553.

The principal changes brought about by the Act of 1910 in the Act of 1906 may be summarized as follows:

(a) The Commission was authorized to proceed upon its own initiative.

(b) It eliminated the condition as to the necessity of a reasonable or satisfactory through route.

(c) It restricted the right so that it would not apply to certain sorts of electric passenger railways and to carriers wholly by water.

(d) It added the requirement found in 15 (D) against short hauling.

(e) It gave to shippers the right of selection of routes when the property was delivered "to any railroad corporation being a common carrier."

3.

The next change was in 1920, and the Act of February 28, 1920, in so far as applies to the matter specially in hand, is as follows:

Section 15 (3)

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be

charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water."

Section 15 (4)

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish tempo-

rarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15 (6)

"Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions therof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

Section 15 (8)

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading; *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

The principal changes worked by this Act are as follows:

(a) The right to establish routes within the limitations of the Act was made obligatory upon the Commission "whenever deemed by it to be necessary or desirable in the public interest."

(b) "Maxima or minima" or "maxima and minima" rates could be fixed by the Commission.

(c) Certain changes as to carriers by water, not necessary now to consider.

(d) Substituting the phrase "carrier by railroad" in the fourth paragraph of Section 15 for the word "company."

(e) Provide exceptions as follows: "Except as provided in Section 3 and except where one of the carriers is a water line."

(f) It provided additional powers to the Commission in cases of emergency.

Office Supreme Court, U.
FILED
APR 5 1924
WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,
v.
AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees. } No. 666

SOUTHEASTERN EXPRESS COMPANY, Appellant,
v.
AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees. } No. 667

SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and SOUTHERN FISHERIES ASSOCIATION, Appellants,
v.
AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees. } No. 668

BRIEF FOR SEABOARD AIR LINE RAILWAY COMPANY.

HOLLINS N. RANDOLPH,
ROBERT S. PARKER,
Attorneys for Seaboard Air Line Railway Company.

TABLE OF CONTENTS.

	Page
STATEMENT OF THE CASE	1-4
ARGUMENT	4-8
(a). The Seaboard Air Line Railway Company has the right to enjoy the fruits of its contract with the American Railway Express Company, and this does not constitute discrimination against Southern Railway Company	4-7
(b). The Commission has not decided that the express service as handled by American Railway Express Company over the lines of the Seaboard Air Line Railway Company is unsatisfactory	7-8

CASES CITED.

	Page
Atchison, Topeka and Sante Fe Railway Company vs. United States, 232 U. S. 199	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants, v. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees.	No. 666
SOUTHEASTERN EXPRESS COMPANY, Appellant, v. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees.	No. 667
SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and SOUTHERN FISHERIES ASSOCIATION, Appellants, v. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees.	No. 668

BRIEF FOR SEABOARD AIR LINE RAILWAY COMPANY.

The references to pages of the transcript of record contained in this brief indicate the record printed in No. 667. By stipulation, the record in each of the above cases

is the same except as to formal parts. Each case is an appeal from the same order or judgment, and the only record which is complete within itself is that in which the Southeastern Express Company is the appellant.

STATEMENT OF FACTS.

Seaboard Air Line Railway Company filed in the Court below its petition for intervention in this cause, praying that it be made a party plaintiff. (Transcript pp. 46-50). The petition was duly verified, and the Court allowed the intervention.

The intervention speaks for itself, and the intervenor has no desire to burden the Court with an extensive argument, but thinking that the filing of a short brief may facilitate the deliberations of the Court, the intervenor sets forth herein a short statement of its contentions as embodied in the petition for intervention, and a summary of the facts upon which it relies for relief.

Seaboard Air Line Railway Company is a common carrier by railroad, engaged in the transportation of persons and freight in interstate commerce. It has a line of railway, among others, extending from Birmingham, Alabama, to Atlanta, Georgia, and from Atlanta to Richmond. From Richmond, Virginia, it has traffic arrangements with the Richmond, Fredericksburg and Potomac Railroad which, although a separate corporation, is owned in part by the Seaboard.

Under traffic arrangements with the Richmond, Fredericksburg and Potomac, the trains of intervenor, both freight and passenger, operate into Washington, and under traffic arrangements existing between the Seaboard and the Pennsylvania System, the Seaboard is enabled to maintain service for both freight and passengers from Birmingham,

Alabama, through Atlanta, thence to Washington, and on into the City of New York. This freight and passenger service embraces all intermediate points and reaches other points on connecting lines. The record (Transcript p. 47) shows that the intervenor does not, in its capacity as a common carrier by railroad, maintain directly a transportation service of the kind commonly termed an express service. Transportation of express and express matter is, however, an important portion of intervenor's railroad business, and is a necessary service for the industries and persons which intervenor serves.

Intervenor has entered into a contract with American Railway Express Company (Transcript pp. 51-91) under the provisions of which the latter does an express business over the lines of intervenor. The gross operating revenues accruing from said express business amount, approximately, to the sum of one million dollars per annum. (Transcript p. 48). In these revenues intervenor participates.

The cars in which express is transported by American Railway Express Company are supplied by intervenor. Intervenor also supplies the roadbed and rails, and all other railroad equipment, including the motive power and rolling stock, together with the crews necessary to operate the trains upon which the express is transported.

Because of the fact that the Seaboard Air Line Railway Company is a common carrier by railroad, and is in effect carrying on an express transportation business through the medium of the American Railway Express Company, the Seaboard Air Line Railway Company claimed, in its petition for intervention, the protection of the Fifth Amendment to the Constitution of the United States, and of the protective provisions contained and set out in the fourth paragraph of the fifteenth section of the Act to Regulate Commerce.

The intervenor further showed, in and by its petition for intervention, that in anticipation of enjoying the fruits of its contract with the American Railway Express Company, and as a matter of necessity in order to take care of express business arising thereunder, it had been forced to lease from the Arms-Yager Railway Car Company fifty (50) extra cars at a gross rental of one hundred eighteen thousand six hundred and twenty-five (118,625.00) dollars per year; that in order to supply the necessary equipment for said cars, including steam heat fixtures and lights, the sum of eighteen thousand two hundred nine dollars and twenty-eight cents ($18,209.28) has been expended, fifty (50%) per cent of which was paid by the Seaboard Air Line Railway Company; that subsequently intervenor found it necessary to lease twenty (20) additional cars at an expense of forty-seven thousand four hundred and fifty (47,450.00) dollars per year; that said cars are leased for periods expiring April 30, 1924, and June 15, 1924, respectively.

The petition for intervention also showed the facilities which had been provided for the handling of express, and charged that the effect of the order of the Interstate Commerce Commission in the original bill complained of, would be to deprive intervenor of the haul over its own through routes of such express originating in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York, and upon all points on the direct routes of the American Railway Express Company between New York and Washington, as might be directed to be diverted therefrom at Washington.

ARGUMENT.

In the brief which has been filed by appellant Southeastern Express Company, the right of the Seaboard Air Line Railway Company to contest the order of the Commission, complained of in the original bill of complaint, is challenged

upon certain grounds which may be summarized as follows:

1. To allow the Seaboard Air Line Railway Company to enjoy the fruits of its contract with the American Railway Express Company, would be discrimination as against the Southern Railway Company.

2. To allow the Seaboard to continue to make use of the facilities for handling express which it has provided, would be to delay the handling of express to certain Southeastern Express Company Stations.

We respectfully contend that neither proposition asserted by the appellant is well founded, either in law or in fact.

The argument of the Southeastern Express Company would make it appear that the American Railway Express Company is seeking to bolster up a doubtful right to assert a protection under section fifteen of the Act to Regulate Commerce, by bringing into the case on its side of the controversy, a corporation which is beyond question a "common carrier by railroad."

We respectfully state to the Court that the Seaboard Air Line Railway Company is in the case to protect its own property rights. While we believe the American Railway Express Company to be a "common carrier by railroad" within the meaning and spirit of the Act to Regulate Commerce, and as such entitled to protection against an attempted order of the Commission which would require it to "short haul" itself, the Seaboard Air Line Railway Company is not here presenting the contentions of the Appellee Express Company.

These contentions have been fully argued in a brief filed herein by the Appellee Express Company.

The Seaboard Air Line Railway Company does assert, on

its own account, that it has provided facilities for the handling of an express business, which it is entitled to handle under the law and by virtue of its lawful contractual relationship with the American Railway Express Company.

Having provided facilities which it was required to provide in order to handle the business, and to carry on its functions as a common carrier, and which it was its duty to furnish, under the law, it has the right to use those facilities.

Atchison, Topeka and Santa Fe Railway Company vs. United States, 232 U. S. 199.

The Seaboard Air Line Railway Company has, furthermore, the right to the long haul over its own rails, and through facilities which it has provided, unless any such through route would be unreasonably long as compared with another practicable through route which could otherwise be established.

The Seaboard Air Line Railway Company does not contend, as would appear from the brief of the appellant, Southeastern Express Company, that the Southern Railway Company should be eliminated from all competition with it. What the Seaboard Air Line Railway Company does contend, is that it has the right to be in this case to protect its own property interests which would be infringed and violated by any order of the Commission which would virtually deny to the American Railway Express Company the right to carry express business which it originates, over the routes which it has established, and which the Commission has found to be reasonable and satisfactory.

It is respectfully submitted that paragraph three of section three of the Act to Regulate Commerce contains nothing which would restrict the Seaboard Air Line Railway Company in the enjoyment of its rights under said contract.

Nor are the decisions and authorities cited in the brief of appellant relevant in any attack upon the position of the Seaboard Air Line Railway Company. No discrimination as against the Southern Railway System results from an exercise on the part of the Seaboard Air Line Railway Company of its legal right to enjoy the fruits of its contract with the American Railway Express Company, and to utilize the facilities which it has provided for the handling of express business in conjunction with the other contracting party.

Appellee Seaboard Air Line Railway Company deems it unnecessary to argue **in extenso** the second proposition asserted by appellant Southeastern Express Company in its attack on the intervention of the Seaboard Air Line Railway Company, viz.: that the handling of express matter over the routes provided by the American Express Company over the lines of the Seaboard Air Line Railway Company results in delays and unsatisfactory service.

That the Commission did not so find is apparent from a study of the proceedings before the Commission and which are in the record (Transcript pp. 17-43). The order of the Commission, complained of in the original bill, in its broad generality takes no account of whether or not the through routes, undertaken by the Commission to be required, are within the exceptions and provisos of paragraph four of section fifteen of the Interstate Commerce Act, or whether or not the same would be in conflict with the prohibitions of said paragraph of said section. Isolated instances of alleged circuitous routing were not considered and passed on by the Commission. It is no answer to the position of the intervenor for the appellant to go outside of the record at bar and undertake to discuss what are claimed to be unreasonable routes.

The case made in the record before the Court, is a case of a general sweeping order which affects the entire business of the American Railway Express Company and also of

the Seaboard Air Line Railway Company. Reasonable through routes and unreasonable through routes (if any) stand alike in the judgment of the Commission. No attempt is made in the order of the Commission to differentiate between the service from Washington to Atlanta, admittedly reasonable and satisfactory and so found by the Commission, and the service between Washington and exclusive Southeastern Express Company points. It is patent from any consideration of the case, that the Commission did not have in mind any determination of the reasonableness or unreasonableness of the service provided by the American Railway Express Company to any particular station or stations. The requirement of the Commission was, to establish new through routes regardless of the sufficiency or reasonableness of existing through routes.

Under these circumstances, therefore, we respectfully assert that it is beside the case to question the right of the Seaboard Air Line Railway Company to invoke the protection of the Courts as against the sweeping force and effect of an order which would tear down its business and invade its property rights, merely because the Commission might hereafter, in another case, direct some change in the handling of express matter from Washington to particular points.

We respectfully ask of the Court the affirmance of the judgment below.

HOLLINS N. RANDOLPH,

ROBERT S. PARKER,

Attorneys for Appellee,

Seaboard Air Line Railway Company.

Office Supreme Court, U. S.
FILED
APR 7 1924
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,* v. AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, *Appellees.*	No. 666.
SOUTHEASTERN EXPRESS COMPANY, *Appellant,* v. AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, *Appellees.*	No. 667.
SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU AND SOUTHERN FISHERIES ASSOCIATION, *Appellants.* v. AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, *Appellees.*	No. 668.

REPLY BRIEF OF AMERICAN RAILWAY EXPRESS COMPANY.

H. S. MARX,
R. C. ALSTON,
T. M. CUNNINGHAM, JR.,
Attorneys for AMERICAN RAILWAY EXPRESS COMPANY.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

INDEX.

PAGE

I. The Commission did not decide either directly or indirectly in the Express Cases (24 I. C. C. 380 and 28 I. C. C. 132) that the provision of the Act prohibiting the short hauling of a carrier did not apply to Express Companies 2

II. Some of the contentions in the brief of the Southeastern Company as to Section 15 (4) of the Interstate Commerce Act..... 6

III. The construction by the Interstate Commerce Commission of the phrase "carrier by railroad"..... 12

IV. Reply to the contention that the Commission derives the power to confer on shippers the right to route from Section 15 (3); and that Section 15 (8) was enacted in order to give shippers the right to route over through freight routes voluntarily created by railroad companies..... 16

V. Section 3 of the Interstate Commerce Act is not involved in this case... 21

VI. It is immaterial in this case whether the Uniform Express Contract is or is not a pooling arrangement. That question has no relevancy to this case 24

PAGE

VII. The American offered to make joint rates between all offices of both Companies provided that the originating Company shall have the right to the long haul so far as that can be preserved to it without causing unreasonable delay in the delivery of the traffic to the consignee.. 27

VIII. The brief for the United States..... 30

IX. The American Company is not cut off from urging that the order of the Commission was unjust and unreasonable because it did not take a cross Appeal..... 31

X. Conclusion 32

CASES CITED.

	PAGE
Baltimore & Carolina Steamship Company *v.* A. C. L. Railroad, 49 I. C. C. 176.....	13
Ellis *v.* I. C. C., 237 U. S. 434.....	14
In re Transportation of Strawberries by Express, etc., 81 I. C. C. 634.....	14
Lumber Rates from Texas, etc., 28 I. C. C. 471, 474, citing and quoting from 22 I. C. C. 39, 46.....	6
Matter of the Express Contract, 1920, 59 I. C. C. 518-522.....	19
Murray Lighterage & Transportation Co. *v.* D. & H. Co., 25 I. C. C. 388, 391.....	27
Oyler & Son *v.* American Railway Express Company, 83 I. C. C. 160.....	13, 14
Peoria & P. U. Ry. Co. *v.* the United States, *et al.*, 44 Sup. Ct. Rep. 194.....	31
Truckers Transfer Co. *v.* Charleston & Western Carolina Ry. Co., 27 I. C. C. 275, 278	27
Wells-Fargo & Company *v.* Taylor, 254 U. S. 175	10

STATUTES CITED.

Accident Report Act (36 Stat. 350).....	10
Act of June 29th, 1906 (34 Stat. 584).....	9
Locomotive Ash Pan Act (35 Stat. 486)....	10
Safety Appliance Act (27 Stat. 531).....	10

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants, v. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees.	No. 666.
SOUTHEASTERN EXPRESS COMPANY, Appellant, v. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees.	No. 667.
SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and SOUTHERN FISHERIES ASSOCIATION, Appellants, v. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees.	No. 668.

REPLY BRIEF OF AMERICAN RAILWAY EXPRESS COMPANY.

We believe that our main brief and this reply cover the contentions set forth in the briefs filed by

the various Appellants, and we shall endeavor to avoid repetition. In this reply we direct our argument specifically to matters referred to in the brief of the Southeastern Express Company.

I.

The Commission did not decide either directly or indirectly in the Express Cases (24 I. C. C. 380 and 28 I. C. C. 132) that the provision of the Act prohibiting the short hauling of a carrier did not apply to Express Companies.

The Southeastern Express Company all through its brief takes the position that the Interstate Commerce Commission in these two Express cases decided in substance and effect that the limitation in the Act prohibiting the short hauling of a carrier by railroad did not apply to Express Companies.

1. The Commission does not mention in either of the Express cases the provision of the Act which was then in effect which prohibited short hauling. The Commission did not have in mind any distinction as to this matter between a railroad company and an express company because the Commission frequently refers in these two decisions to an express company as an agency of the railroad or as an arm of the railroad.

2. The attention of the Commission in these two cases was directed to two prime objects, first, to devise a system of rates whereby the same rate would be applicable between any two places irre-

spective of the route over which the shipment moved; and in order to build up this system of rates all of the express companies were treated as a unit. This was the only respect in which the Commission ever undertook to treat the eleven different express companies as a unit. The second object the Commission had in view was to prevent circuitous routing.

3. The Commission did not have in mind any distinction between express companies and railroad companies in the matter of routing of shipments, for in the opening passage of the decision in 24 I. C. C., at page 387, the Commission said:

> "The Act to regulate commerce now imposes upon all of the railroad carriers the obligation to make through routes and to furnish proper facilities for the transportation of freight. This rule applies to parcels as to carloads. The Act also by name recognizes the express company as a carrier subject to our jurisdiction. We must, therefore, regard these great forwarding companies as agencies created by the railroads, etc."

4. Under the head of "Causes of Complaint" the Commission listed:

> "3. Indirect routing of shipments by the express carrier resulting in unreasonable delays and defeating the reason for the existence of an express service as distinguished from ordinary freight service" (24 I. C. C. 388).

5. Under the head of "Circuitous Routing of Shipments", the Commission said:

> "We find, however, that it has been the custom of the express carriers when shipments have been intrusted to them for delivery at

> points not on the lines of railroad over which they operate, to retain possession of the shipment *so as to receive the longest possible haul* via their own lines. The result has followed that many shipments have been carried by round about routes before being delivered to the final carrier" (Italics ours) (24 I. C. C. 392).

We do not contend in this case for the longest possible haul by the American lines. We only contend for the right to hold the traffic which we originate to our own lines as long as we can reasonably do so. The Commission then decided that in order to avoid this circuitous and indirect routing "the express carriers must unite in direct through routes reaching all cities and towns accessible to each other by the shortest route measured in time" (24 I. C. C. 382, 393, 433).

The Commission did not have in mind short hauling a carrier. The Commission was simply providing for direct through routes. In order to control the matter of routing, the carriers themselves first created a joint routing committee (24 I. C. C. 394), and afterwards a Direct Routing Committee was created, in which the Commission itself participated (28 I. C. C. 136).

6. On page 411 of the decision in 24 I. C. C., the Commission was discussing Rule 16, which provided, first, where a shipment passed over the lines of two or more companies that the rates should be made by combining the local rates of each company via the transfer point which would produce the lowest through rate; and, secondly, the rule made provision for the division of the through rate. The block and zone system of rate making established by the Commission nullified the first part of Rule 16, which provided for the making of the through

rate on the combination of the locals. The Commission then said:

> "The remaining provisions of the Rule concern the division of earnings. We have said to these carriers in connection with the discussion of the establishment of through routes and rates, that in their arrangements for the division of earnings due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest possible haul via its own lines, and that divisions shall be agreed upon which shall compensate the originating carrier for its sacrifice."

This portion of the decision is quoted in the brief of the Southeastern Express Company (see p. 66 of the brief in connection with pp. 81 and 89) as though it were a decision by the Commission that the originating carrier of express was not entitled to the long haul. In the first place, the extract from the decision recognizes the originating carrier's *right* to the long haul. We do not contend that an express company is entitled to the longest haul possible via its own lines. The Commission recognized that it was a sacrifice to take the shipment away from the originating carrier short of destination and that it should be compensated therefor in the divisions. But this is very far from saying or intimating that where a carrier had a reasonable direct through route to destination that it could be short hauled by its competitor and compensated therefor by a division of the rates.

A great many references are made in the brief of the Southeastern Express Company to the argument that express companies were made a national system or a unit by the Express Case in 24th I. C. C.

Similar language has been used in reference to railroads. See Lumber Rates from Texas, etc., 28 I. C. C. 471, 474, citing and quoting from 22 I. C. C. 39, 46, where the following appears:

> "Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

This obligation to establish a national system has never been construed or thought to include the right to short-haul, and of course it does not, and just as it does not as to railroads, so it does not as to express companies.

II.

Some of the contentions in the brief of the Southeastern Company as to Section 15(4) of the Interstate Commerce Act.

1. On page 44 of its brief the Southeastern Express Company states: "In the grant of power in Paragraph 3 of Section 15, in defining therein the jurisdiction and duties of the Commission, the broad designation 'any common carrier or carriers, subject to the Act' is employed." This statement is repeated twice again in the brief, bottom of page 37, page 38. Upon this predicate the Southeastern Company argues that the employment of the term "carrier by railroad" in paragraph 4 of Section 15 being a narrower term than "any common carrier or carriers subject to the Act", it was therefore the

intention of the Commission to exclude express companies. There is no such phrase as "any common carrier or carriers, subject to the Act" in paragraph 3 of Section 15. Paragraph 3 of Section 15 gives power to the Commission to establish through routes and joint rates "applicable to the transportation of passengers or property". And under this language Express Companies are included. Paragraph 4 then provides, "In establishing any such through route" the Commission must not short haul a carrier by railroad. The last clause of paragraph 3 excepted water lines; therefore paragraph 4 provided that "in establishing any such through route" carriers by railroad should not be short hauled.

2. The reason the phrase "any carrier by railroad" is used in Section 15(4) is because it was not intended to include carriers by water, or by pipe line, or any other kind of a carrier except carriers by railroad. When the Act of 1920 inserted in the parenthesis the exception "where one of the carriers is a water line" the phrase "any carrier by railroad" was substituted for "any company" because of the exclusion of a carrier partly by rail and partly by water; and also because the last clause of paragraph 3 excepted a carrier wholly by water. The change from "any company" to "any carrier by railroad" does not weaken but strengthens our position.

3. The Southeastern argues that the phrase "any carrier by railroad" should be interpreted so as to read "any carrier which owns or operates a railroad". If Congress had intended so to restrict the paragraph, it would have said so. The word "by" is used to describe the kind of transportation employed and was not employed to indicate that the

carrier must own or operate the railroad. No reason has been suggested why the limitation should not apply to an express company which carries by railroad, as well as to a railroad company which carries by railroad. In one or two places in its brief the Southeastern refers to a carrier *by* express. This is not an accurate designation of an express company. It may be referred to as a carrier *of* express but hardly as a carrier *by* express. The Southeastern Company argues that this paragraph cannot apply to an express company because the paragraph speaks of "the entire length of its railroad and any intermediate railroad operated in conjunction or under a common management or control therewith". Congress was merely describing the route of the carrier which could not be short hauled. In striking out the words "any company" and substituting "any carrier by railroad" it was not necessary to change the language describing the route which the Commission was prohibited from short hauling. The language, when its purpose is considered and the connection in which it is used, certainly does not require the interpretation for which the Southeastern contends. If an express company is included within the expression "any carrier by railroad", there is no difficulty about the application of the paragraph so far as the route is concerned.

4. The Southeastern refers in its brief, page 48, to Section 300 of the Transportation Act which creates the Labor Board. The first paragraph of Section 300 is as follows:

> "Section 300. When used in this title—
>
> "(1) The term 'carrier' includes any express company, sleeping car company, and any carrier by railroad subject to the Interstate Commerce Act, etc."

The Southeastern argues that this is a legislative definition—that an express company and a sleeping car company are not carriers by railroad. This section of the Transportation Act is not a part of the Interstate Commerce Act and is not an amendment of it. Congress did not mean by this definition of the term "carrier" to say that an express company or a sleeping car company were not carriers by railroad. Section 300 was defining the term "carrier"; it was not defining the term "carrier by railroad". The fact is that Congress desired to make the section applicable to carriers by railroad and therefore provided that the term "carrier" should include any express company, sleeping car company, and any carrier by railroad. This is very far from saying or intimating that an express company or a sleeping car company is not a carrier by railroad.

In construing the Interstate Commerce Act, it should be remembered that the phrase "carrier by railroad" is nowhere employed in the original Act or in its many amendments until the Act of June 29th, 1906 (34 Stat. 584) and that the first and only place in which it is used in this amendment is in Section 2 amending Section 6 of the original Act (p. 586) in which the phrase is used to distinguish carriers by railroad from carriers by pipe line or by water.

When carriers by pipe line and carriers by telegraph, telephone, and cable, and carriers of express, and sleeping car companies were all introduced into the Act, it then became necessary to use a short phrase such as "carriers by railroad" to describe such carriers as used that instrumentality. Whenever it is desired to refer to all the carriers subject to the Act, the Act employs the term "car-

riers" or "common carriers" or "carriers subject to the Act". It is undoubtedly true that in some places in the Act the phrase "carrier by railroad" is used where it is obvious from the context that only a carrier which operates a railroad is intended. Where the context does not clearly show that it was intended to so restrict the meaning of the phrase, it should not be so restricted. Unless the phrase "carrier by railroad" was sufficiently comprehensive to include an express company which used a railroad in the carriage of its business, the case of Wells-Fargo & Company *v.* Taylor, 254 U. S. 175, would never have arisen. The question in that case was whether, considering the context and the purpose of the Act, express companies were included. The phrase itself was broad enough to include them. The Court had to resort to the test of construction according to the context of the Act in order to exclude them. For instance: In the Locomotive Ash Pan Act (35 Stat. 486) and in the Safety Appliance Act (27 Stat. 531) and in the Accident Report Act (36 Stat. 350) it is obvious enough that express companies are not included, although the phrase "carrier by railroad" or similar phrase is used.

5. On page 47 of the brief of the Southeastern Company a reference is made to Section 209 of the Transportation Act of 1920, which provides the guaranty to carriers after the termination of Federal control. This section defines the term "carrier" as follows:

> "(1). A carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal Control at the time Federal Control terminates, etc."

> "(2). A sleeping car company whose system of transportation is under Federal Control at the time Federal Control terminates."

There was only one express company at this time, namely, the American Railway Express Company, and it was included by its name. This is argued by the Southeastern as a legislative definition of the phrase "carrier by railroad". This section is not an amendment to the Interstate Commerce Act. We are here dealing with the "Dictionary of the Act" to regulate commerce. It is quite obvious that the carrier by railroad described in the first paragraph of Section 209 is the carrier *whose railroad or system* of transportation is under Federal Control. This section of the Transportation Act was providing a guaranty to the Railroad Company which owned the railroad and which as owner of the railroad would be entitled to the guaranty; therefore, it used the expression "a carrier by railroad or partly by railroad and partly by water, *whose railroad or system* of transportation is under Federal control at the time Federal control terminates". (Italics ours.) If Congress had not made special provision for the sleeping car company and the American Railway Express Company in subsequent paragraphs of Section 209, they would naturally have been excluded by the language of paragraph 1 of Section 209.

The Southeastern Express Company argues in its brief, page 62 that:

> "Terms which may be used to describe the character of, and means by which, an express company conducts its business, do not necessarily or even argumentatively describe its individual person when its amenability to, or exemption from, regulatory particulars is being considered."

If that statement is true, then every express company and every other common carrier in Interstate Commerce is under the terms of the Act. Everybody knows that this is not true, and the "means by which an express company conducts its business" is the exact thing which determines whether or not an express company is within or without the terms of the Act.

III.

The construction by the Interstate Commerce Commission of the phrase "carrier by railroad".

This subject is dealt with by the Southeastern Express Company in its brief pages 54 to 67, and the Southeastern Express Company says at page 63, "This departmental construction is entitled to the utmost weight in this case", and again on page 62 of its brief the Southeastern Company says:

> "We have thus painstakingly traced the construction which the Commission has placed upon the term 'carrier by railroad' as used in different portions of the Interstate Commerce Act for the purpose of demonstrating that invariably that tribunal has confined that term to the *owner, proprietor or operator* of railroads, and has never undertaken to exercise over express companies and other companies, not owning or operating railroads, the powers and control vested in it by Congress where the grant of power used the specific term 'car rier by railroad'."

We propose to review very briefly the cases cited by the Southeastern which we think will demon-

strate that there is nothing in this contention of "departmental construction".

1. The case of Baltimore & Carolina Steamship Company *v.* A. C. L. Railroad, 49 I. C. C. 176, is cited at page 55 of the Southeastern Company's brief. In that case the only question was whether the Commission had jurisdiction to establish through routes between a railroad company and a steamboat line. In the course of the opinion the Commission said at page 184: "The limitation in Section 15 refers specifically to railroads and apparently was intended to insure to the originating rail line as large a share as possible of the movement of freight by rail." In other words, the Commission said that the limitation did not refer to a combination of a rail and water line. The question as to whether it referred to an express company was not even remotely involved.

2. The cases in 57 I. C. C. 591 and 63 I. C. C. 375, which are referred to on pages 56 and 57 of the brief of the Southeastern Company, both involved the question as to whether paragraph 2, section 3, of the Interstate Commerce Act was applicable to freight moving wholly or partly by water. This provision of the Act is to the effect that *no carrier by railroad* shall deliver freight at destination until the charges are paid, except under such rules and regulations as the Commission may prescribe. The Commission simply held that a carrier wholly by water and a carrier partly by water and partly by railroad was not a carrier by railroad within the meaning of this Section of the Act. Neither of these decisions touch an express company.

3. The Southeastern in its brief at pages 58 and 59 refers to Oyler & Son *v.* American Railway Ex-

press Company, 83 I. C. C. 160, and *in re* Transportation of Strawberries by Express, etc., 81 I. C. C. 634. These two decisions merely hold that the car service provisions of the Interstate Commerce Act do not apply to express companies. The case first cited was decided by the Commission in part upon the authority of its decision in the case at bar. The Commission did hold in the case at bar that an express company was not a "carrier by railroad" under Section 15, Paragraph 4, of the Act. If the Commission was right in its decision in the case at bar that an express company was not included under Section 15, Paragraph 4, then *a fortiori* an express company was not included under the car service provision. Obviously, an express company, considering the context of the car service provision (Sec. 1, Par. 10-17), is not covered by the provision.

4. In 70 I. C. C. 575 and 71 I. C. C. 7, cited on page 59 of the Southeastern Company's brief, the Commission held that the Chicago, New York and Boston Refrigerator Company was not covered by Section 209 of the Transportation Act 1920, which is the Guaranty section of the Transportation Act. This section is not a part of the Interstate Commerce Act. The Refrigerator Company was not within the provision "carrier by railroad" because it was not a carrier at all. This Refrigerator Company merely owned cars which it leased to railroads. It had nothing whatever to do with the transportation of freight in the cars. The Supreme Court of the United States in the case of Armour Car Lines, had already decided that these car lines were not carriers subject to the Act to Regulate Commerce (Ellis *v.* I. C. C., 237 U. S. 434).

The two cases in 72 I. C. C. 169 and 72 I. C. C. 809, cited on page 61 of the Southeastern Company's brief are both cases where companies owning grain elevators tried to get in under the Guaranty provision of Section 209 of the Transportation Act of 1920, and it was decided very properly that neither of them were carriers.

5. On page 65 of the Southeastern's brief the express cases, 24 I. C. C. 380, 28 I. C. C. 132, are referred to as decisions by the Commission holding that the provisions of the Act as to short hauling a carrier did not apply to express companies. In the first part of this brief we have shown that these express cases did not either directly or indirectly decide this question.

6. The cases above cited are the cases relied on by the Southeastern as "departmental construction entitled to the utmost weight in this case". The cases cited simply do not touch the question at issue here.

IV.

Reply to the contention that the Commission derives the power to confer on shippers the right to route from Section 15 (3); and that Section 15 (8) was enacted in order to give shippers the right to route over through freight routes voluntarily created by railroad companies.

These contentions of the Southeastern Express Company are contained in its brief, pages 167-178.

We have already shown in our main brief that the Commission did not derive power to confer on shippers the right to route from the clause in Section 15(3) which gives the Commission the power in making through routes to establish "the terms and conditions under which such through routes shall be operated". We showed that this clause came into the Act by the amendment of June 29, 1906 (34 Stat. 590), and that in 1909 the Commission in its 23rd annual report represented to Congress that under the Act shippers did not have the right to route and that the Commission could not confer such a right on them, and, in response to this suggestion of the Commission, Congress on June 18, 1910 (36 Stat. 539), enacted the provision as it now stands in Section 15(8), giving the shippers the right to route.

The Commission having decided that express companies were not included within the term "any carrier by railroad" under Section 15(4), had practically precluded itself from holding that express companies were under Section 15(8) because in Section 15(8) the right to route related to prop-

erty delivered "to any railroad corporation being a common carrier" and therefore the Commission fell back on the power to establish the terms and conditions under which through routes shall be operated.

Now the Southeastern Express Company undertakes to dig the Commission out of this hole by contending first, that Section 15(8) was enacted for the purpose of giving shippers of freight the right to route over through freight routes *voluntarily* established by railroad companies, and secondly, that through express routes are not voluntarily established by express companies as are through freight routes by railroad companies.

1. The Southeastern contends especially on page 170 of its brief that there is a substantial difference in the manner in which through express routes are created and through freight routes. It says that through freight routes are in large measure voluntarily created by the railroad companies, whereas through express routes were all prescribed and created by the Commission in the Express Cases. This is the very thing which the Commission did not do in the Express Cases. It found it a wholly impracticable thing to do. The only thing the Commission did do was to provide by general order that express should be routed along the most direct routes in point of time. In the decision in the first Express Case, 24 I. C. C. at pages 393 and 394, it left the matter of routings to a joint routing committee of express companies, and in the second decision in 28 I. C. C. 138, a Direct Routing Committee was organized, and routes were abolished and established by voluntary action as the exigencies of the traffic required. When there were eleven express companies in the field, both before and after

the decision in the Express Cases, the routes were voluntarily established in large part by the express companies and not by the action of the Commission.

2. The idea that Section 15(8) of the Act was enacted so as to give shippers the right to route over through routes *voluntarily* established by carriers of freight is wholly unsupported by anything in the Act itself. Certainly the Committees of the Senate in dealing with the subject had no such conception, as we pointed out in our original brief.

Section 15(8) provides: "In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates *shall have been established as in this Act provided,*" then the shipper shall have the right to route. On its face this section relates to through routes established as in the Act provided, that is to say established either by the Commission or established voluntarily by the carrier. The notion that a shipper of express gets the right to route under Section 15(3) and not under Section 15(8) and that a shipper of freight gets the right to route under Section 15(3) as to routes established by the Commission and under Section 15(8) as to routes established by voluntary action of the railroad company, is wholly unsupported by anything in the Act, or by any supposed distinction between express business and freight business.

We have already discussed in our main brief the propositions that the creation of through routes and joint rates are entirely different matters from

the shipper's right to route, and that the Commission had this right to create through routes and joint rates before it ever had the power to confer on shippers the right to route.

We have also discussed in our main brief the contention that it would be futile to create through routes unless at the same time shippers were given the right to route, and we have there shown that through routes are established mainly so that carriers may route over them. In point of fact, shippers never had any right to route until 1910.

3. We have not contended that shippers did not have the right to route over properly established routes. We have said that we thought that Section 15(8), construed with the other sections with which it is associated, gives the shippers of express matter the right of selection where two or more through routes are properly established, but that the Commission could not establish a route and short-haul an express company by giving shippers the right to route, because of the limitation upon the power of the Commission contained in Section 15(4). Our contention is that unless the right to route is conferred by Section 15(8) it is not conferred at all.

4. The Interstate Commerce Commission has substantially held that Section 15(8) does include an express Company. In the Matter of the Express Contract, 1920, 59 I. C. C. 518-522, the Commission says:

> "the *statutory* right of a shipper to designate the routing of his traffic and the corelative duty of a carrier to observe his instructions come into play only where *'two or more through routes and through rates shall have*

> *been established'* and there is *'a connecting line'* to which the initial carrier can make delivery pursuant to the instructions." (Italics ours.)

It will be noted that the Commission is here dealing solely with shipments of express matter. It speaks of *"the statutory right"* of the shipper to route. It then makes quotations supporting "statutory right", and we turn to Section 15(8) of the Act and find that the quotation is taken from that section and paragraph. This means, of course, that the Commission treated this paragraph as being applicable to express companies. One may search in vain for any other basis of "statutory right" of a shipper to route, or for any other place in the Act where the quotations made by the Commission appear.

5. At page 172 of its brief the Southeastern Express Company argues that the Commission in prescribing the shipper's routing as a part of its system of express rates evidently did not deal with express companies as carriers by railroad falling within the terms of paragraph 8 of Section 15, since, had it so regarded express companies, the orders as to shippers and routing would have been superfluous, as the right would automatically attach under paragraph 8 of Section 15. The Commission was dealing with the system in which the express companies reserved the right to themselves to route shipments. (24 I. C. C., p. 405.)

The Commission adopted Rule 3, which provided that

> "Shippers, by designation in writing, may route shipments by way of such established routes and transfer points as they may desire."

This language is certainly inspired by paragraph 8 of Section 15. Much of it, in fact, is a paraphrase of this section. Note the language at the bottom of page 393, 24th I. C. C., which is referred to under the subject "Routing", page 405. In providing for the establishment of routes the Commission, at page 393, 24th I. C. C., said:

> "The Consignor shall have the right to designate in writing the joint through route thus established and published, by which the specific shipment shall move."

The Commission intended to there treat the express company as being included in the phrase "any railroad corporation being a common carrier".

V.

Section 3 of the Interstate Commerce Act is not involved in this case.

The Southeastern Express Company in its brief at pages 117 to 153 contends that this case falls under Section 3 of the Act, and, therefore, paragraph 4 of Section 15 is not applicable because by its terms it is not applicable where a case falls under Section 3.

Section 3 is the section which makes it unlawful for a carrier to give undue or unreasonable preference or advantage to any particular person, locality or description of traffic or to subject them to any undue or unreasonable prejudice or disadvantage.

1. The Commission did not find that Section 3 of the Act was involved. It did not pronounce anything that the American did or omitted to do as an

undue or unreasonable preference or advantage to any person, locality or traffic. The Southeastern Express Company has quoted certain passages from the opinion of the Commission as though they were findings of the Commission on this subject. Instead of being findings they are recitations of the contentions of the parties. Thus the portion of the opinion of the Commission quoted in the Southeastern brief at page 131. If the Court will read this extract from the opinion of the Commission in connection with the paragraph which immediately precedes it, both of which are to be found on page 32 of the record, it will be seen that the Commission was here merely reciting the contentions of the parties.

2. The majority of the special court in their opinion (Record, bottom p. 123, and top p. 124) find that:

> "Section 3 is not sought to be applied and the existing routes which embrace all of the lines of the American Railway Express Company between the several termini involved are not held by the Commission to be unreasonably long."

3. The order made by the Commission in this case is an order which puts it in the power of the Southeastern Express Company and of shippers to short haul the American Company through the Washington gateway. The Commission concedes that as to this traffic the American has its own reasonable route. The order does not condemn any route operated by the American Company.

4. The Commission put its finding in this case fairly and squarely upon the proposition that an

express company was not included in Section 15(4) of the Act, and that, therefore, the Commission had the power to short haul an express company if it thought it desirable or necessary in the public interest to do so.

5. The interlocutory injunction issued in this case does not prevent the Interstate Commerce Commission from finding if the facts warrant it, that the American has violated Section 3 of the Act or any other section of the Act. The interlocutory injunction (R. 121) merely prohibits the Commission from establishing through routes contrary to the provisions of paragraph 4 of Section 15 of the Act.

6. We do not apprehend that either the Commission or any court would hold that the American Company had violated either Section 3 or any other section of the Act, by holding to its own lines the traffic which it had originated itself, as long as it could reasonably do so.

7. Neither the Government, nor the Commission, nor the other Interveners have taken the position in any of their briefs that Section 3 of the Act is involved.

VI.

It is immaterial in this case whether the Uniform Express Contract is or is not a pooling arrangement. That question has no relevancy to this case.

This question is discussed in the brief of the Southeastern, pages 94 to 108.

We have already shown in our main brief that the organization of the American Railway Express Company has been specifically authorized by the Interstate Commerce Commission and that the Commission has had before it the alleged pooling provisions of the contract and under paragraph 1 of Section 5 of the Act the Commission has approved and authorized these provisions of the contract.

1. This contention of the Southeastern Express Company was not noticed by the Commission in either of its opinions rendered in this case. Nor does the Interstate Commerce Commission in its brief filed in this case put forward any such contention. Judge Bryan in his dissenting opinion (R. 132) seems to think the Interstate Commerce Commission has practically "unlimited" power in this matter and his opinon to this effect is induced in part by the alleged pooling arrangement of the Uniform Express Contract. On page 100 of its brief the Southeastern Express Company makes the suggestion that it was, perhaps, fortunate that in view of this case the Commission did not withdraw its approval of the Uniform Express

Contract, and in the next breath and on the same page the Southeastern Express Company says:

> "In other words, the Commission has found a way by which its approval of the contract can legally continue providing through routes and joint rates which it has required in the order already entered and which it may hereafter require to be kept open and made available to the public."

It is rather inconsistent to start out by saying that the American Company was fortunate that the Commission did not use the Uniform Express Contract as a club over the head of the American in this case and then to wind up with the statement that the Commission has found a way through this contract to make an order which it otherwise could not make.

2. In this same connection the Southeastern Express Company in its brief claims that the American Company is "stifling competition" and monopolizing express business and obstructing reasonable competition. There is nothing in the record to justify such contentions. The Southeastern Express Company operates from Washington to Birmingham over the main line of the Southern Railway. The American Company operates from Washington to Birmingham over the Richmond, Fredericksburg & Potomac and Seaboard Air Line Railways. The Southeastern is competing with the American for this business from Washington to Birmingham and intermediate points. If the American has the legal right under the Interstate Commerce Act to haul the traffic which it originates as far as it reasonably can do so, the fact that it avails itself of its rights under the Act cannot fairly

be characterized either as stifling competition or as monopolizing business. In point of fact, the Southeastern Express Company is seeking to short haul the American Company through the Washington gateway on business which the Southeastern Company has neither the trouble nor the expense of originating. It has always been a fundamental principle in the American law of carriers that the carrier which originates traffic has the right to keep the traffic to its own lines as long as it may fairly and reasonably do so without any inconvenience to the public. If it were not for this principle there would be no inducement for a carrier to build expensive terminals and to reach out for and initiate traffic. The Southeastern Express Company is doubtless carrying all of the north bound traffic which it originates through the Washington gateway and thereby getting the long haul on its own lines.

Neither the Government, nor the Commission, nor any other Intervener has taken the position in any of their briefs that the pooling provision of the Act has anything to do with this situation. Of course it has not. In no event would the pooling provision of the Act have been passed upon with no other parties before the Commission than those persons who are here parties. The Commission squarely based its ruling upon other grounds.

VII.

The American offered to make joint rates between all offices of both Companies provided that the originating Company shall have the right to the long haul so far as that can be preserved to it without causing unreasonable delay in the delivery of the traffic to the consignee.

1. This tariff was rejected by the Interstate Commerce Commission (R. 40). This tariff is quoted in the Southeastern's brief at page 132 and at pages 133 to 135. Complaint is made by the Southeastern that this tariff proposed by the American only made rates from common points on north bound traffic and did not provide for rates on south bound traffic. We might answer that the Commission itself has established routes and rates in the same way; see Murray Lighterage & Transportation Co. *v.* D. & H. Co., 25 I. C. C. 388, 391, and Truckers Transfer Co. *v.* Charleston & Western Carolina Ry. Co., 27 I. C. C. 275, 278. But the tariff provided for joint rates from all offices of both Companies. What the Southeastern really means is that as it had no lines north of Washington under this tariff it could not take any business away from the American coming from points north of Washington because the tariff preserved to the originating company the right to the long haul. The Commission rejected the tariff because it preserved to the originating carrier the long haul and the Commission was proceeding on the theory that it had the right to take the long haul away from the originating carrier if it saw fit to do

so and if in the opinion of the Commission it was necessary or desirable to do so in the public interest.

2. The Southeastern complains in its brief especially at page 109 that the American has closed to it the Washington gateway. The Southeastern discusses the case as though the American had been the aggressor in this matter and had taken away from the Southeastern something to which it had legitimate right. The fact is the shoe is on the other foot. On May 1st, 1921, the Southern Railway excluded the American Company from all of its lines and made a contract with the Southeastern Express Company, a rival and competitive company. Thereupon naturally the American Company ceased hauling its traffic from Washington over the lines of the Southern Railway and hauled its traffic over the Richmond, Fredericksburg & Potomac and the Seaboard Air Line Railways with both of which it had contracts. The Southeastern seems to think that because once upon a time the American carried its express traffic over the main lines of the Southern Railway from Washington that it must do so always notwithstanding the Southern Railway has put the American Railway Express Company off its lines and made a contract with another company to operate over its lines.

On May 1st, 1921, as soon as the Southeastern Express Company began to operate it published a tariff the effect of which was to open up all the business originating by the American Railway Express Company to the Southeastern Company. In other words, under this tariff the Southeastern Express Company at Washington and at all other border points would be in a position to short haul the American Company on the traffic originated by it in the territory in which it exclusively operates.

Immediately the American Company did the only thing it could do under the exigencies of the situation and limited its concurrence to traffic moving between exclusive offices of both companies. Subsequently the American Company opened up many joint routes with the Southeastern Company. The American Company holds itself ready at any time to open up any joint routes where it appears it is in the public interest to do so. The only thing for which the American contends is that where it originates traffic it is entitled to hold it to its own lines as long as it can reasonably do so. The Commission has not condemned any of the routes operated by the American in this case. The order relates entirely to traffic originating in New England, New York City and at points along the main line from New York to Washington, and relates exclusively to traffic destined to points on the main line of the Southern Railway between Washington and Birmingham. No other routes and no other traffic is involved in the case. It is idle to discuss other routes and other traffic. The Commission itself said (R. 19):

> "The record abounds in comparisons of express schedules from which it is argued by each company that the specific route used or desired to be used is practical and gives either equal or better service than the other route or routes in question. Nothing can be gained by setting forth all these comparisons."

The only effect of the voluminous references in the brief of the Southeastern Express Company to the various routes which were discussed in the case before the Commission is to muddy the waters. The Commission's order relates to precise and definite traffic and the only question in the case is whether this order is a lawful and valid order.

VIII.

The brief for the United States.

We believe that what we have said in our briefs answers the brief filed by the Solicitor General in behalf of the United States and also the matters covered in the briefs filed by the other appellants, but we desire to refer specifically to the brief of the Solicitor General, wherein he sets forth at great length statutory provisions relative to the use of the words "carrier by railroad". We believe that a complete answer to this argument is, as found by the District Court, that the ordinary acceptation of these words was changed when express companies were brought into the Interstate Commerce Act, and therefore their meaning is to be determined by the "dictionary" of that Act and not by the meaning they may have in other Acts, or outside of the Interstate Commerce Act.

It also must be borne in mind that the Interstate Commerce Act applies only to common carriers engaged in transportation "wholly by railroad, or partly by railroad and partly by water", and that therefore an express company can be subject to that Act only when it is a "carrier by railroad".

IX.

The American Company is not cut off from urging that the order of the Commission was unjust and unreasonable because it did not take a cross Appeal.

Southeastern Express Company contends in its brief, page 179, that the American Company cannot contend that the order of the Commission was arbitrary and unreasonable because the majority of the special court decided this question against the American and that as the American took no cross Appeal it cannot be heard on this question.

It is entirely unnecessary to take any cross Appeal. The appeal brings up the whole case on the law and on the facts. The question before the Supreme Court is whether the interlocutory injunction granted by the District Court is right or wrong. It does not make any difference what may be the reason which moved the District Court to grant the interlocutory injunction if it was right. The American Company can urge any reason or any ground in support of the interlocutory injunction granted by the District Court.

The only case cited by the Southeastern in support of its contention is Peoria & P. U. Ry Co. *v.* the United States, *et al.*, 44 Sup. Ct. Rep. 194. This case, just like the case at bar, was an injunction suit brought against the United States under the Act of October 22, 1913, to set aside an order of the Interstate Commerce Commission. The United States contended that the suit was brought in the wrong jurisdiction and this question was decided against it in the District Court. It took no appeal from this decision to the Supreme Court. When

the cases got to the Supreme Court, the United States there insisted upon its jurisdictional point. The Supreme Court decided that under the Act of October 22, 1913, the question was not one of jurisdiction at all, but was one of venue, and that the question of venue having been decided against the United States in the lower court by not taking an appeal from the decision, it waived the question of venue. The question of venue was an entirely separate and independent question from the merits of the controversy. We were satisfied in this case with the interlocutory injunction granted by the Court, and therefore there was no reason why we should take any cross Appeal. We are entitled to urge in support of the grant of the injunction any good and valid reasons to sustain it.

X.

Conclusion.

We respectfully submit that the decree of the District Court should be affirmed.

H. S. MARX,
R. C. ALSTON,
T. M. CUNNINGHAM, JR.,
Attorneys for American Railway Express Co.

Dated April 5, 1924.

reasonably long as compared with another practicable through route which could otherwise be established." *Held*, that an express company is not a "carrier by railroad" within the meaning of the paragraph. P. 430.

2. An appellee in support of the decree in his favor, may reassert grounds that were rejected by the court below, without taking a cross appeal. P. 435.
3. Under its power to establish through routes "whenever deemed by it necessary or desirable in the public interest" (Interstate Commerce Act, § 15, par. 3,) the Commission, for the sake of securing better service through competition, may reasonably require an express company to form joint routes with another express company between points already served by existing routes of the former over which delivery may be made as promptly as over the new routes. P. 436.
4. In such case, also, having the authority to fix "the terms and conditions under which such through routes shall be operated," (§ 15, par. 3, *supra*) the Commission reasonably may leave the direction of the routing to the shipper. P. 437.
5. A carrier has no absolute right to retain the traffic it originates for transportation to destination over its own line. *Id.*

293 Fed. 31, reversed.

APPEALS from a decree of the District Court temporarily enjoining enforcement of an order of the Interstate Commerce Commission establishing through routes for the American Railway and Southeastern Express Companies. The suit was brought by the former company. The Seaboard Air Line Railway intervened as plaintiff. The Commission, the other express company, the Southern Traffic League, and other shippers' associations, intervened as defendants.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. Robert C. Alston and *Mr. T. M. Cunningham, Jr.*, with whom *Mr. H. S. Marx* was on the briefs, for the American Railway Express Company, appellee.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Sanders McDaniel, with whom *Mr. Charles J. Rixey* was on the brief, for the Southeastern Express Company, appellant.

Mr. Hollins N. Randolph and *Mr. Robert S. Parker* filed a brief on behalf of the Seaboard Air Line Railway Company, appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Transportation Act, 1920, c. 91, § 418, 41 Stat. 456, 485, amending Interstate Commerce Act, § 15, par. 3, directs that the Commission "shall whenever deemed by it to be necessary or desirable in the public interest . . . establish through routes." Paragraph 4 of that section provides: "In establishing any such through route the Commission shall not . . . require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established." That is, the Commission shall not compel the carrier to short haul its traffic. The main question for decision is whether the American Railway Express Company, which uses the railroads for its transportation service as described in *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 177, 178, is itself a "carrier by railroad" within the meaning of paragraph 4.

The American was organized, in June, 1918, as a war measure, to take over the express business done on the railroads which had come under federal control. After the Government relinquished such control, this consolidation of the transportation business and property of the express companies was approved by the Commission, under paragraph 7 of § 5 of the Interstate Commerce Act as amended by Transportation Act, 1920. *Consolidation of Express Companies*, 59 I. C. C. 459. Uniform contracts were entered into by the American with substantially all the railroads of the United States, *Express Contract, 1920*, 59 I. C. C. 518; and it enjoyed a practical monopoly of the railroad express business until May 1, 1921. On that day the Southeastern Express Company entered the field, by utilizing for that purpose the Southern Railway system and affiliated lines, in all about 10,000 miles of railroad. Many cities and towns in the southeastern States are now served both by the American and by the Southeastern. These are called common points. A larger number in those States are served only by one of the companies. These are called exclusive points. Except in the southeastern States, practically all railroad express offices in the United States are exclusive points of the American.

The Southeastern sought to have the American agree with it to establish through routes and joint rates between all points served by them respectively, whether common points or exclusive; and to permit the shipper to give the routing instruction. The American declined to do this; limiting its concurrence to routes between the exclusive points of one company and the exclusive points of the other. In this way, it attempted to secure to itself either the entire haul or the longest possible haul. Thereupon, the Southeastern instituted, before the Commission, proceedings against the American, praying that the Commission establish the through routes and joint rates sought. Another proceeding, seeking in part like relief, was brought against the two express companies by ship-

pers' associations. The cases were consolidated. The Commission ordered the establishment of some of the through routes prayed for,[1] finding that, in order to secure adequate service, it was necessary and desirable in the public interest that competitive joint routes be established, although the American had reasonable routes from origin to destination, or from origin to a point nearer destination than the joint through routes established.

---

[1] The Commission found " that it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Company and points on the lines of the Southeastern Express Company, regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established, in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Company, and the other via the transfer point selected by the American Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established. . . ." See 78 I. C. C. 126, 143.

The order (81 I. C. C. 247) required the companies to establish, on or before October 20, 1923, through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York, N. Y., and all points on the direct routes of the American Railway Express Co. between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Co. from Washington to and including Birmingham, Ala., on the other, with transfer between the companies at Washington, D. C.; that the rates between these points shall not exceed the rates contemporaneously in effect between the same points over the routes now used; and that the tariffs should provide for the right of the shipper to designate in writing the routing of shipments over the routes prescribed. No order was made fixing divisions of the joint rates.

Southeastern Express Co. v. *American Ry. Express Co.*, 78 I. C. C. 126; 81 I. C. C. 247.

Before the effective date of the order, this suit to enjoin its enforcement was brought by the American against the United States in the federal court for northern Georgia. The Seaboard Air Line Railway, one of the many railroads with which the American has a contract, intervened as plaintiff. The Commission, the Southeastern, the Southern Traffic League and other shippers' associations intervened as defendants. The case was heard on application for a temporary injunction by three judges, pursuant to the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220; the order was held void on the ground that the American is a "carrier by railroad" within the meaning of paragraph 4, and that, therefore, the Commission was, on the facts found, without power to make the order; and a temporary injunction [2] was granted, Circuit Judge Bryan dissenting. 293 Fed. 31. The case is here on separate appeals from that decision by the several respondents. The three appeals present the same questions of law.

First. The power to establish through routes is conferred broadly as to all carriers by paragraph 3 of § 15.[3] The limitation upon the power in respect to a "carrier by railroad" is imposed by paragraph 4. The language

[2] The opinion stated that the injunction would be "without prejudice to the right of the Commission to enquire whether, because the existing routes are unreasonably long, or for other cause particularly appearing, any of the proposed new routes can be established consistently with paragraph 4 of section 15 of the Interstate Commerce Act, and, if so, to order their establishment." 293 Fed. 31, 38.

[3] The Act to Regulate Commerce, of February 4, 1887, c. 104, 24 Stat. 379, did not confer upon the Commission any power to establish through routes. Compare *Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U. S. 536, 553. The amendment of June 29, 1906, c. 3591, § 4, 34 Stat. 584, 590, conferred power to do so "when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected

which embodies this limitation is not appropriate to describe the situation of an express company. It is that the Commission may not compel the carrier to embrace in the through route "substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless . . ." An express company has no railroad. It is served by many railroads, as it is served by water lines, by motor trucks and by horses and wagons. Moreover, the language of

---

to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists." The amendment of June 18, 1910, c. 309, § 12, 36 Stat. 539, 552, struck out the proviso and substituted therefor the limitation now reenacted in paragraph 4 of § 15 of the Interstate Commerce Act as amended by Transportation Act, 1920. The latter act struck out, also, the clause in the Act of 1910 by which the Commission's power to establish the through routes was dependent upon failure of the carriers to establish them voluntarily.

Section 1, par. 3, provides that "the term 'common carrier' as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies, etc." Section 1, par. 4, imposes upon every carrier of property the duty to establish through routes. Section 15, par. 1, (which deals, among other things, with joint rates) confers the regulatory powers in respect to "any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act." Paragraph 2, of § 15, deals only with the time when the orders under par. 1 take effect. Paragraph 3 contains no words limiting the scope of the Commission's power to establish through routes to "carriers by railroad." The limitation imposed, as applied to "carriers by railroad," appears first in par. 4. Prior to Transportation Act, 1920, the existence of the unrestricted power to establish through routes and joint rates appears to have been assumed without question by the Commission in *In re Express Rates, etc.*, 24 I. C. C. 380, 392–4; 28 I. C. C. 131, 136. Compare *American Express Co.* v. *United States*, 212 U. S. 522, 531, 534.

paragraph 4 describes aptly a single railroad system, but not a system of express routes extending over many separate railroad systems. Practically every express company has had, as the American has now, routes over many separate railroad systems.[4] However numerous the railroads used, all the routes are parts of a single express system.[5] If an express company is a "carrier by railroad," the "entire length of its railroad" must, as the American argues, be construed to mean the entire length of all the lines of the railroads within the United States over which it has routes. Such a construction would, if adopted, tend to give permanency to an existing monopoly although it failed to give adequate service. For it would deprive the Commission of power to foster the competition found necessary to secure such service. There is nothing in Transportation Act, 1920, which evinces an intention on the part of Congress to accomplish such a purpose.

The natural meaning of the term "carrier by railroad" is one who operates a railroad, not one whose shipments are carried by a railroad. The term is not found in the original Act to Regulate Commerce which was applicable only to carriers "engaged in the transportation of pas-

[4] In 1911 there were 13 express companies of which the 10 important ones conducted their service over 218,013 miles of railway, 18,385 miles of steamship and stage lines, and 6,665 miles of electric lines. *In re Express Rates, etc.*, 24 I. C. C. 380, 384; 28 I. C. C. 131; 35 I. C. C. 3; *Proposed Increase in Express Rates*, 50 I. C. C. 385, 391. January 1, 1918, there were only 7 such express companies in the United States. *Consolidation of Express Companies*, 59 I. C. C. 459, 460. Compare *Express Rates*, 1922, 83 I. C. C. 606, 622.

[5] The American, which was the only express company doing business over the railroads when Transportation Act, 1920, was enacted, conducted its service over nearly all of the 235,234 miles of railroad of the first class in the United States. These were operated by 186 separate railroad companies. "Statistics of Railways of the United States" for 1920, p. x, (Interstate Commerce Commission); *Consolidation of Express Companies*, 59 I. C. C. 459, 460.

sengers or property wholly by railroad, or partly by railroad and partly by water." [6] When the amendment of 1906 extended the Commission's jurisdiction to express companies, sleeping car companies and pipe lines, and that of 1910 extended its jurisdiction to telegraph, telephone and cable companies, occasion for differentiating between carriers arose; as some of the provisions of the Act to Regulate Commerce were obviously not applicable to all the classes of carriers which had been made subject to regulation. But to what extent its provisions should be applied to any class was left, by those amendments, largely to construction. In Transportation Act, 1920, the phrase "carrier by railroad" seems to have been systematically employed to designate sections of the Interstate Commerce Act which apply only to carriers operating railroads.[7] The term was introduced by

[6] See § 1. The phrase used in all later sections of the original act is "any common carrier subject to the provisions of this act." See §§ 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 20. Compare § 22. The Commission held in *In re Express Companies,* 1 I. C. C. 349, that while express business conducted as a department of a railroad was subject to the original act, such business when conducted by an independent company, which had acquired rights by contract with the railroad, was not subject to the act. Nor is the term "carrier by railroad" found in the amendments of March 2, 1889, c. 382, 25 Stat. 855; of February 10, 1891, c. 128, 26 Stat. 743; or of February 19, 1903, c. 708, 32 Stat. 847. In the amendment of 1906, it appears in § 2 (34 Stat. p. 586); and in the amendment of 1910, it appears in §§ 8 and 9 (36 Stat. p. 548). But in connection with the establishment of through routes, the use of the term "carrier by railroad" appears for the first time in the amendment made by Transportation Act, 1920.

[7] See following provisions of Interstate Commerce Act as amended by Transportation Act, 1920, Title IV; § 1, pars. 10, 11, 12, 13, 14, 16, 17, 18, 20, 21, as compared with pars. 3, 4 and 6; § 3, par. 2, as compared with pars. 1 and 3; § 4, par. 2, as compared with par. 1; § 5, par. 6, as compared with par. 7 (also, 1 and 2); § 15, par. 4, as compared with pars. 1, 3, 6, 7, 11; § 15a; § 20a; § 25, pars. 2 and 4; § 26. See also § 204(a), 209(a), 210(a), 300(1).

it in paragraph 4 in place of the word "company" which had been used in the amendment of 1910.[8] The purpose of the substitution was to make it clearer that the prohibition against compelling a carrier to short-haul its traffic was limited to railroads. The same phrase had been adopted in the Federal Employers' Liability Act of April 22, 1908, c. 149, §§ 1, 2, and 3, 35 Stat. 65, 66.[9] As used in that act, it was held in *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 187, 188, not to include independent express companies doing business over railroads. In § 15(4) of Transportation Act, 1920, it should be given the same meaning. Compare *United States ex rel. Chicago, New York & Boston Refrigerator Co.* v. *Interstate Commerce Commission, ante,* 292.

Second. The American claims that the order is void, even if the limitation contained in paragraph 4 is not applicable to express companies. One contention is that the order exceeds the power conferred upon the Commission, because it is, as a matter of law, unreasonable to establish a second through route merely for the sake of securing

[8] Section 15, as amended by the Act of June 18, 1910, c. 309, 36 Stat. 539, read: "The Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad, etc."

[9] The phrase had been introduced in the Safety Appliance Act of March 2, 1903, c. 976, § 1, 32 Stat. 943; but it was not found in the original Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531; nor in the amendment thereof of April 14, 1910, c. 160, 36 Stat. 298. The term is used in the Hours of Service Act, March 4, 1907, c. 2939, 34 Stat. 1415; the Ash-Pan Act, May 30, 1908, c. 225, § 2, 35 Stat. 476; and the Boiler Inspection Act, February 17, 1911, c. 103, 36 Stat. 913. On the other hand, the 28 Hour Law, June 29, 1906, c. 3594, 34 Stat. 607, enumerates "railroad, express company, car company, common carrier other than by water." The Railway Mail Service Pay Provision, July 28, 1916, c. 261, § 5, 39 Stat. 412, 429, employs the phrase "railway common carriers"; and the Merchant Marine Act, June 5, 1920, c. 250, § 8, 41 Stat. 988, 992, the phrase "carrier by rail."

competition in service. Another contention is that the order exceeds the power conferred upon the Commission because it purports to authorize the shipper to give routing instructions. The further claim is made that the American has, as a matter of law, the right to carry, over its own lines, traffic which it originates, as long as this can be done without unreasonably delaying the delivery at destination; that this right to haul its traffic to destination is property protected by the Fifth Amendment; that to authorize the shipper to give routing instructions takes this property; and that the provision for making an equitable division of the joint rate does not afford the legal compensation for the taking to which it is entitled.

The Southeastern insists that these claims, although adequately presented in the bill of complaint, cannot be availed of in this Court, because they were overruled by the District Court and the American did not take a cross-appeal. The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.[10] By the claims now in question, the American does not attack,

[10] *The William Bagaley*, 5 Wall. 377, 412; "*The Stephen Morgan*," 94 U. S. 599; *Landram* v. *Jordan*, 203 U. S. 56, 62. Compare *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 111.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* AMERICAN RAILWAY EXPRESS COMPANY ET AL.

SOUTHEASTERN EXPRESS COMPANY *v.* AMERICAN RAILWAY EXPRESS COMPANY ET AL.

SOUTHERN TRAFFIC LEAGUE ET AL. *v.* AMERICAN RAILWAY EXPRESS COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

Nos. 666–668. Argued April 16, 17, 1924.—Decided June 2, 1924.

1. Section 15, par. 4, of the amended Interstate Commerce Act provides that, in establishing any through route, the Commission shall not "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route un-

in any respect, the decree entered below.[11] It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined.

The competitive route ordered must, of course, be reasonable in character from the standpoint of transportation; and there must be reasonable cause for establishing it. In this case, no objection is made to the character of the routes ordered. The objection is that, as a matter of law, the competitive routes cannot be justified because the time required for delivery over the existing routes of the American is as short as it would be under the competitive joint routes. To this objection the action taken by Congress supplies an answer. Under the Act of 1906, the Commission could act only if no "reasonable or satisfactory through route exists." In *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, this Court set aside an order to establish a second through route because it deemed the existing one adequate. Thereupon, Congress, by the Amendment of 1910, struck out the proviso and empowered the Commission to establish through routes "whenever deemed by it to be necessary or desirable in the public interest." In transportation, the quality of the service furnished may be as important to the shipper as the rate. The Commission found, in the proceeding under review, that the service of the American, in some instances, had been inadequate; and that in "considering competition, time is not the only important element. Competition tends to make each company improve its general treatment of the public, its practices,

[11] The decision in *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528, 536, upon which the appellants rely, rests upon the peculiar character of the question raised. There the objection upon which the appellee relied was one of venue. The District Court overruled it; and then dismissed the bill on the merits. An objection to venue can be waived at any stage of the proceeding. This Court held that it was waived by failure to take a cross-appeal.

rules, and regulations in regard to its methods of doing business." It found, also, that the "service at common points has improved since the formation of the Southeastern." Its conclusion, that the establishment of the competitive routes was necessary and desirable in the public interest, is not shown to have been unreasonable.

The existence of a competitive route ordinarily implies an option in the shipper. To give him the privilege of directing the routing is a corollary of the establishment of competitive routes. Upon shippers of railroad freight this right was expressly conferred by Congress, in paragraph 8 of § 15, subject only "to such reasonable exceptions and regulations" as the Commission may prescribe. The rights, in this respect, of shippers by express, were not dealt with in terms. The matter was, therefore, left subject to regulation by the Commission under general provisions of the act. Paragraph 3, which empowers the Commission to establish through routes, authorizes it, also, to fix "the terms and conditions under which such through routes shall be operated." Its order that the shipper by express may direct the routing is not unreasonable.[12] As the American has no absolute right to retain traffic which it originates, and as the provision authorizing the shipper to direct the routing is reasonable,

[12] Rule 3 of the express classification, approved by the Commission, provided that the shippers "by designation in writing may route shipments by way of such established routes and transfer points as they may desire." See *In re Express Rates, etc.*, 24 I. C. C. 380, 392, 405; 28 I. C. C. 131. The Commission found that "the American refuses to obey shipper's routing instructions, and disregards rule 3 of the express classification." See *Southeastern Express Co.* v. *American Ry. Express Co.*, 78 I. C. C. 126, 140. The statements and practice of the Commission in the cases relied upon by the American are entirely consistent with this rule. See Annual Report, for 1909, p. 7. Also *Cincinnati & Columbus Traction Co.* v. *Baltimore & Ohio Southwestern R. R. Co.*, 20 I. C. C. 486, 490; *In re Express Rates, etc.*, 24 I. C. C. 380, 411.

the order does not violate any of its constitutional rights. We have no occasion to consider any of the other grounds urged in its support.

Reversed.